84-251

No. ____

Office-Supreme Court, U.S.
FILED
AUG 13 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ELDEE EDWARDS, JR. *et al.*,
Petitioners,

v.

CONSOLIDATED RAIL CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

VAN S. POWERS
Counsel of Record
4344 Farragut Street
Hyattsville, Maryland 20781
(301) 277-3311

PRESS OF RAM PRINTING, HYATTSVILLE, MD (301) 864-6662

1771 pp

I. QUESTIONS PRESENTED FOR REVIEW

A. WHETHER THE GRANTING OF SUMMARY JUDGMENT AGAINST THE MINOR PLAINTIFF WAS CONTRARY TO THIS COURT'S HOLDING IN BEST V. DISTRICT OF COLUMBIA, 291 U.S. 411, 54 S.Ct. 487, 78 L.Ed 882 (1934) WHICH REQUIRES THAT ISSUES OF PRIMARY NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE BE SUBMITTED TO THE JURY FOR DETERMINATION WHERE A CHILD TRESPASSER IS INJURED BY AN ARTIFICIAL, DANGEROUS CONDITION ON THE LAND OF ANOTHER AND THERE ARE ISSUES IN DISPUTE BETWEEN THE PARTIES.

B. WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AGAINST THE MINOR PLAINTIFF WHEN STATUTORY LAW IN THE DISTRICT OF COLUMBIA PROVIDES FOR STRICT LIABILITY OF RAILROADS FOR INJURIES SUSTAINED IN CONNECTION WITH THE "CONSTRUCTION, INSTALLATION, MAINTENANCE, OR OPERATION OF THE ELECTRICAL EQUIPMENT AND APPARATUS OF THE RAILROAD TRAINS".

C. WHETHER THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT BY DECIDING GENUINE ISSUES OF MATERIAL FACT, CONTRARY TO RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE, AND IN VIOLATION OF PLAINTIFFS' RIGHT TO A TRIAL BY JURY OF THE FACTUAL ISSUES DISPOSITIVE OF THE LITIGATION.

II. LIST OF ALL PARTIES TO THE PROCEEDING

ELDEE EDWARDS, JR., a minor

PETITIONER (PLAINTIFF/APPELLANT below)

ELDEE EDWARDS, SR., father and next friend of Eldee Edwards, Jr.

BOOKER T. EDWARDS, guardian-ad-litem for Eldee Edwards, Jr. and Eldee Edwards, Sr.

CONSOLIDATED RAIL CORPORATION

RESPONDENT (DEFENDANT/APPELLEE below)

James B. Sarsfield, Esquire
Stephen A. Trimble, Esquire
Attorneys for Respondent
734 15th Street, N.W.
Washington, D.C. 20005
(202) 347-2882

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V. REFERENCE TO OFFICIAL REPORT OF OPINION

EDWARDS v. CONSOLIDATED RAIL CORP., 567 F. Supp. 1087 (1983)

VI. GROUNDS FOR JURISDICTION

1. Petitioners seek review of the Order of the United States District Court for the District of Columbia per Judge Louis F. Oberdorfer dated July 6, 1983 which granted defendant Consolidated Rail Corporation's Motion for Summary Judgment.

2. On appeal to the United States Circuit Court of Appeals for the District of Columbia Circuit, the Order of the District Court was affirmed per the panel of Judges Wald, Wilkey and Ritchey (sitting by special designation) by Order dated April 2, 1984 which adopted the opinion of Judge Oberdorfer.

3. Petitioners, appellants below, timely filed a Petition for Rehearing and Suggestion of Rehearing En Banc. By Orders dated May 17, 1984, the Petition and the Suggestion were denied.

VII. CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

District of Columbia Code, Section 7-1430

District of Columbia Code, Section 1434

Rule 56, Federal Rules of Civil Procedure, 28 U.S.C.

VIII. STATEMENT OF THE CASE

The basis for federal jurisdiction in the United States District Court for the District of Columbia is diversity of citizenship under 28 U.S.C. Section 1332.

On July 7, 1979, Eldee Edwards, Jr., who was then 11 years old, rode a bicycle along with friends from RFK Stadium down to the Sousa Bridge by the Potomac River in the District of Columbia. There was a train standing at that location and several cars had open doors and ladders leading to the top of the cars. After climbing through an open boxcar, as did his friends, Eldee Edwards climbed the ladder to the top of a tanker-type car. He was severely burned and injured when he came in contact with, or close proximity to, a catenary line carrying more than 12,000 volts of electricity and which was approximately at the level of his head and shoulders.

Consolidated Rail Corporation owned the land, the track, and the catenary system at the location

where Eldee Edwards was injured. It should be noted that there was, and is, a paved road running parallel to the tracks in this area and that it leads to a marina a short way from the place of the incident. Directly across the road from the location where the minor plaintiff was injured is a large grassy area where people picnic and fish. The existence of graffiti on the walls of the tunnel through the Sousa Bridge, twenty to thirty yards from the site of the incident, indicates others had also trespassed on this area of track.

There was no fencing in this area to keep children away from the tracks or standing cars. The only signs in the area were "No Trespassing" stencilled on catenary poles. The lettering was only 3-4 inches high and in most cases was faded or pealing. There were no signs warning of danger from high voltage electricity.

IX. ARGUMENT FOR ALLOWANCE OF THE WRIT

THE GRANTING OF SUMMARY JUDGMENT AGAINST THE MINOR PLAINTIFF WAS CONTRARY TO THIS COURT'S HOLDING IN BEST V. DISTRICT OF COLUMBIA, 291 U.S. 411, 54 S.Ct. 487, 78 L. Ed. 882 (1934) WHICH REQUIRES THAT ISSUES OF PRIMARY NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE BE SUBMITTED TO THE JURY FOR DETERMINATION WHERE A CHILD TRESPASSER IS INJURED BY AN ARTIFICIAL, DANGEROUS CONDITION ON THE LAND OF ANOTHER AND THERE ARE ISSUES IN DISPUTE BETWEEN THE PARTIES.

a.) In Best v. District of Columbia, 291 U.S. 411, 54 S.Ct. 487,78 L.Ed. 882 (1934), a five (5) year old boy trespassed on land owned by the District of Columbia. He fell through a hole in the wharf and was drowned. In an action by his estate's administrator, the trial court directed a verdict for the defendant at the close of plaintiff's opening statement. The Supreme Court of the United States reversed. Writing for the Court, Chief Justice Hughes stated:

> "Where uncertainty arises either from a conflict of testimony or because, the facts being undisputed, fair-minded men may honestly draw different conclusions from them, the question is not one of the law but of fact to be settled by the jury." Id. at 291 U.S. 415

Noting the location of the wharf, the fact that it was unfenced and that sand piles would constitute a bait to children, the Court went on to say:

> "The question is one of negligence, whether particular circumstances gave rise to a duty which had not been performed.... On the other hand, it was said that while 'temptation is not invitation, it may be held that knowingly to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an invitation to them although not to an adult'...Where the case merely one of an accessible wharf, it could not be said that the District would be subject to liability from the fact, without more, that a child strayed there and fell from the wharf into the water. The duty must find its source in special circumstances in which, by reason of the inducement and of the fact that visits of children to the place would naturally be anticipated, and because of the character of the danger to which they would unwittingly be exposed, reasonable prudence would require that precautions be taken for their protection. Id at 291 U.S. 419 (underline added)

The granting of summary judgment in this case flies in the face of the clear import of Best.

The question of negligence and contributory negligence were properly for determination by the jury. The trial Court improperly decided questions of fact and its decision should be reversed

Likewise, the entry of summary judgment was contrary to the existing case law of the District of Columbia Circuit. Firfer v. United States, 93 U.S. App. D.C. 216, 208 F.2d (D.C. Cir., 1953) expresses the general rule of landowner liability to trespassers. "They may recover only for intentional, wanton, or willful injury or the maintenance of a hidden engine of destruction" Firfer at 208 F.2d 528 (underline added). That is the situation in this case.

McGettigan v. National Bank of Washington, 320 F.2d 703, cert. denied 375 U.S. 943, 84 S.Ct. 348, 11 L.Ed. 2d 273 (D.C. Cir. 1963); Eastburn v. Levin, 72 U.S. App D.C. 190, 113 F.2d 176 (D.C. Cir. 1940); and Hankins v. Southern Foundation Corporation, 216 F. Supp. 554 (D.D.C. 1963)

affirmed 326 F.2d 693 (D.C. Cir. 1963) all support the proposition that this case should have been submitted to the jury.

In McGettigan, a nine (9) year old boy was injured by the explosion of a flare which his brother had taken from a rundown and abandoned building owned by the defendant. In ruling that the defendants were not entitled to a judgment as a matter of law, and therefore not entitled to summary judgment, the court also stated:

> "The ultimate question is whether defendant can fairly be said to be responsible for the injuries complained of. If reasonable men could not differ in answering that question the court, it is said, should not allow the jury to speculate about it; but if reasonable men could differ and draw different inferences from the facts or find one set of facts when two are offered and from those found could conclude that defendant's conduct was negligent, then the jury ought to be permitted to answer the ultimate question." McGettigan at 320 F.2d 705

In Hankins v. Southern Foundation Corporation, 216 F. Supp. 554 (D.D.C. 1963), affirmed 326 F.2d 693 (D.C. Cir. 1963), the Circuit Court of Appeals

for the District of Columbia Circuit affirmed the trial court's denial of a motion for judgment N.O.V., reduction of the verdict or alternatively for new trial following a jury verdict for the trespassing child. Citing Best and Eastburn v. Levin, 72 U.S. App. D.C. 190, 113 F.2d 176 (D.C. Cir. 1940), Judge Youngdahl reasoned that the questions of negligence, contributory negligence and assumption of risk should be resolved by the jury where a child trespassed on a construction site and drowned when the ice over a deep ditch gave way.

In Eastburn v. Levin, the Circuit Court of Appeals for the District of Columbia Circuit overturned a direct verdict entered for the defendant and against the eight (8) year old plaintiff who had received injuries when he trespassed in the defendant's junk yard. After quoting Best, the court went on to say:

"The jury should have been permitted to decide whether the special circumstances on which the Court relied in the Best case-attraction, danger not apparent to children, and likelihood of visits of children - were present here, and if so, whether defendant took reasonable precautions for the protection of the children." Eastburn v. Levin at 113 F.2d 177.

In closing it's opinion, the court concluded:

"The underlying question is whether it is better to let occupants arrange their premises in total disregard of neighboring children, or to require them to take such precautions as a normal person would when their premises are attractive and insidiously dangerous to children too young to look out for themselves and when the intrusion of such children is likely. On the one side is the occupant's interest, and the general interest, in the profitable use of land. On the other is the childs interest, and the interest of his parents and of society, in life and limb and in compensation for their injury. Imposing responsibility is more apt to make occupants careful than, denying responsibility is to make children careful; occupants may know little about law, but children know nothing about it and children will play where they can. And the liability in question is less exceptional than is sometimes supposed. Rather, the immunity of occupants of land, so far as immunity

> persists, from responsibility for unreasonably dangerous conditions is one of the exceptions to the growing and healthy tendency of the law to require all social conduct to conform to social standards." Id at 113 F. 2d 178

b.) The trial court misconstrued the meaning of Holland v. B.O. Railroad Co., 431 A.2d 597 (D.C. Ct. App. 1981) which held that the attractive nuisance doctrine exceptions, or Section 339 of the Restatement of Torts, Second, does not apply to the general rule established in Firfer v. United States, 93 U.S. App. D.C. 216, 208 F.2d 524 (D.C. Cir. 1953) in the situation where the minor plaintiff was injured by a moving train. The importance of that one difference from the case at bar cannot be overstated. The plaintiff in this case was injured by high-powered electricity! In its discussion of element (c) of Section 339 of the Restatement of Torts, Second, the Holland court labeled the language of the California Court of Appeals as "persuasively reasoned" in stating:

> "nothing could be more pregnant with warning of danger than the noise and appearance of a huge, rumbling string of railroad cars. It cannot be compared with the silent, deadly danger of high-powered electricity, the inanimate attraction of stationary machines, traps or turntables, loose boards, unseen pitfalls or the still, inviting depths of a swimming pool to a tiny child" Holland at 431 A.2d 603 (underline added)

The test for liability of a landowner for Artificial Condition Highly Dangerous to Trespassing Children as embodied in the elements of Section 339 of the Restatement of Torts, Second, clearly calls for factual determinations, a balancing of various interests and a weighing of values. This is peculiarly the province of the jury and the jury's function should not be usurped by the trial court. The answers to the tests of Section 339 should come from the representatives of the community, the jury, and not from a Judge. The entry of summary judgment in this case was improper.

Judge Oberdorfer's analysis of how plaintiff's case must inevitably fail under subsections (b),

(d) and (e) of Section 339 is fatally flawed in that it substitutes the court's fact finding for that of the jury's. With respect to subsection (b), for example, the court incorrectly concludes that plaintiffs could not prove "the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children." The court based this conclusion on its ruling that none of the almost 100 examples of prior similar incidents unearthed by plaintiffs would be admissible at trial. Plaintiffs have repeatedly drawn the court's attention to the fact that NOTICE to the defendant of prior similar incidents in which children have been horribly maimed or killed is the cornerstone of the trier of fact's inquiry into the reasonableness of the conduct of the defendant. It is a fact that trespassing children climb atop stopped, parked and standing trains in urban areas thereby placing themselves in danger

of mutilation and death from coming in contact with, or close proximity to, catenary lines. If the defendant has knowledge or notice of this, it is a question of fact whether, at a particular site where children trespass, the defendant "has reason to know" that the condition, a catenary line carrying in excess of 12,000 volts above a standing railroad car, poses an "unreasonable risk of death or serious bodily harm to such children."

The court's own opinion, 567 F. Supp. 1087 at 1105 (1983) quotes McCormick to the effect that where a party presents evidence of prior, similar incidents to show notice to the defendant, the requirement of similarity of conditions is much relaxed. But then the court went on to apply a test more rigid than if plaintiffs sought to introduce the evidence to show the dangerousness of the condition, when the requirement of similarity of conditions is at its stictest.

The issue here is NOTICE! Hecht Co. Inc. v. Jacobsen, 86 U.S. App. D.C. 81, 180 F.2d 13 (1950)

In Julander v. Ford Motor Company, 448 F. 2d 839 (10th Cir. 1973), plaintiffs sued the automaker for a defect in the steering mechanism which caused the car to cross the center line and collide head on with another vehicle. In ruling on the admissibility of prior complaints and whether they constituted notice to Ford, the court stated:

> "Generally, where negligence is in issue, prior complaints to a defendant concerning an allegedly hazardous condition are admitted as being probative of the defendant's knowledge. This knowledge, in turn, then operates as a standard against which can be tested the reasonableness of the defendants conduct with regard to the allegedly hazardous condition." Id. at 448 F.2d 846 (underline added)

Whether the car crossed the center line in Topeka, Kansas or Jacksonville, Florida is not the point. The point is the notice to the defendant of the type of incident or problem. In this case, all prior catenary related injuries and deaths were reported back to the corporate defendant in Philadelphia at the system level. Also see Ramos v. Liberty Mutual Ins. Co., 615 F.2d

334 (1980).

The court's examination of the facts regarding subsections (d) and (e) likewise usurp the jury's intended function. It is clearly the job of 12 men and women from the community to decide whether the burden to defendant Consolidated Rail Corporation of fencing, signing or using an alternative power source is slight as compared with the risk to the children. How can the trial judge be permitted to put a value on the risk to children so as to be able to compare it with the utility to the defendant? The text of Section 339 is saturated with words calling for value judgments, balancing of competing interests, and determinations which reflect the consensus of the community. It is respectfully submitted that this is a jury function in the most traditional sense and that it ought not be tampered with by the trial judge.

With respect to subsection (d), the court's opinion states that the catenary system is

"necessary to provide power to enable defendant to run its interstate trains." That statement is factually incorrect. The catenary system is limited to what is known as the Northeast Corridor and it is only one means defendant uses to power its trains. In fact, for whatever the reasons may have been, other railroads have simply chosen to turn off the power in certain locations and use other means of powering their trains. There is nothing which prevents a deisel engine from operating beneath a de-energized catenary line. Again, however, the questions of the utility of the system, the burden of eliminating the danger, the risk to the children and the comparison of these factors are clearly matters of fact and should not be decided as matters of law. Contrary to the conclusion of the trial court, the Institute in finishing its comment on subsection (d), stated that "while wires are necessary to carry high-tension electric current, the burden of properly safeguarding wires maintained at places

where trespassing children may be expected to come into contact with them is obviously slight as compared with the gravity of harm which they threaten and the chance that such harm will result." (note n. p. 205), (underline added)

Likewise, what constitutes the exercise of reasonable care under subsection (e) is a factual issue and should not be determined summarily. It was error for the trial court to rely on the dictum in Holland v. B&O Railroad Co., 431 A.2d 597 (D.C. Ct. App., 1981) to find as a matter of law that the defendant exercised reasonable care when the plaintiff in that case was injured as a result of meddling with a moving train. The situations simply are not comparable. Likewise, that the FRA does not require fencing or signing on urban rights of way does not mean that the defendant, under the facts of this case, exercised reasonable care as a matter of law.

c.) Apart from any statutorily created cause of action available to plaintiffs in this case or under the standards of the Restatement of Torts, Second, the minor plaintiff asserts a right to recover under the general duty of landowners to trespassers in the District of Columbia.

In 1953, the United States Court of Appeals for the District of Columbia set the standard to be applied in suits by trespassers (regardless of the age of the trespasser) against landowners for injuries suffered on the landowner's property. The standard set in Firfer v. United States, 93 U.S. App. D.C. 216, 208 F.2d 524 (1953) continues to represent the general rule of landowner liability to trespassers in this jurisdiction under the en banc decision in Holland v. B&O Railroad Co., 431 A.2d 597 (D.C. Ct. App., 1981), that:

> "...trespassers may, generally speaking, only recover from landowners for injuries that were willful, wanton, or that resulted from maintenance of a hidden engine of destruction." (underline added)

From this standard set in Firfer and affirmed almost 30 years later in Holland, it is clear that a trespasser can maintain a cause of action against a landowner under ordinary negligence theories and, although a trespasser, he can recover against the landowner. The landowner is liable for any injuries shown to be sustained by the trespasser that resulted from the landowner's maintenance of "a hidden engine of destruction".

The "hidden engine of destruction" in this case is the defendant's catenary lines, suspended about 18½ feet above the railroad tracks, which carry an invisible, lethal 12,000 volts of electricity.

The trial court acknowledged in its opinion, 567 F. Supp. at 1102 that "in the District of Columbia high-voltage electric wires are considered to be inherently dangerous," citing Brown v. Potomac Power Co., 236 F. Supp. 815, 817 (D.D.C. 1964) and Holland, supra, 431 A.2d at 603

referring to the "silent, deadly danger of high-power electricity."

In this case, the defendant admits that at the time of the occurrence, the railroad tracks, right-of-way, and catenary lines at the site where the plaintiff was injured, were owned by the defendant and that any person who touches, or comes in close proximity to, an electrified catenary wire subjects himself to an extreme risk of injury or death.

Yet, despite ownership and maintenance of that "hidden engine of destruction" and knowledge of its deadly destructive power, the railroad never took any measures to warn of the silent electrical danger posed by the overhead wires, asserting throughout these proceedings, no duty to do so is imposed by any statute, regulation or ordinance. The defendant has conspicuously failed to address any duty, in the District of Columbia, imposed under common law and the holdings of the Courts in Firfer, supra, and Holland, supra.

Under the holding in Firfer, without regard to the Attractive Nuisance Exception addressed in Holland, the minor plaintiff is entitled to recover from the defendant for "injuries...that resulted from maintenance of a hidden engine of destruction." The entry of summary judgment for defendant Consolidated Rail Corporation was therefore improper.

B. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AGAINST THE MINOR PLAINTIFF WHEN STATUTORY LAW IN THE DISTRICT OF COLUMBIA PROVIDES FOR STRICT LIABILITY OF RAILROADS FOR INJURIES SUSTAINED IN CONNECTION WITH THE "CONSTRUCTION, INSTALLATION, MAINTENANCE, OR OPERATION OF THE ELECTRICAL EQUIPMENT AND APPARATUS OF THE RAILROAD TRAINS"

In 1934, the Unites States Congress enacted Public Law Number 137, 48 Stat. 506, Chapter 97, Section 1-5, (March 27, 1984) which provided for the electrification of rail lines operated by steam railroad companies within the District of Columbia and for the installation of overhead catenary systems. The statute (formerly Section 7-1230-34) is codified today in District of Columbia Code, Section 7-1430, et seq.

Section 7-1430 provides:

"Electrification of existing steam-railroad lines -- Structures, equipment"

"Steam-railroad companies now operating within the District of Columbia are hereby authorized, after approval of their detailed plans and issuance of a permit by the Commissioners of the District of Columbia, to electrify their lines within the District of Columbia and across the

Anacostia and Potomac Rivers with an alternating current overhead catenary or other type of electrification system, with all necessary transmission, signal, and communication conductors and equipment, poles, conduits, underground and other structures necessary in such electrification, the provisions of any law or laws to the contrary notwithstanding."

Section 7-1434 provides:

"Liability of Railroad for injuries"

"The said railroad companies shall be liable for any accident to, or injuries sustained by, any person by reason of any act or omission of the railroad companies or by their agents or servants during the construction, installation, maintenance, or operation of the electrical equipment and apparatus of the railroad trains." (underline added)

The Restatement 2d, Torts, Section 285 provides that the "standard of conduct of a reasonable man may be (a) established by a legislative enactment of administrative regulation which so provides, ..." Comment (b) states:

"In any or all of these respects the standard of conduct may be defined and established by a legislative enactment which lays down requirements of conduct, and

> provides expressly or by implication that a violation shall entail civil liability in tort. In such case the only questions that can arise as to the effect of the statute are as to its constitutionality and construction. If it is constitutional, and the intent to impose civil liability is clear, the court must apply it." (underline added)

Section 285 has been cited with approval in the District of Columbia. Tobin v. Pennsylvania R.R., (D.C. Cir. 1938) 100 F.2d 435, 439, cert. den. 306 U.S. 640; Boland v. Love (D.C. Cir. 1955) 222 F.2d 27, 31.

Comment (i) to Section 285 provides:

> "In so far as the standard to which an actor must conform to avoid being negligent is fixed by a legislative enactment, the fact that the legislature is defining what it regards as the standard of conduct of a reasonable man in less obvious. But on analysis it is clear that such is the case. By prohibiting a particular act for the purpose of protecting the interests of some person or class of persons as individuals, the legislative body declares its opinion that the risk involved therein is unreasonable." (See Section 286.)

Section 286, Restatement 2d, Torts, sets forth the requirements for negligence per se and provides:

> "When Standard of Conduct Defined by Legislation or Regulation Will Be Adopted"
>
> "The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part"
>
> "(a) to protect a class of persons which includes the one whose interest is invaded, and"
> "(b) to protect the particular interest which is invaded, and"
> "(c) to protect that interest against the kind of harm which has resulted, and"
> "(d) to protect that interest against the particular hazard from which the harm results."

Comment (c) states:

> "A legislative enactment or an administrative regulation may provide in specific terms or by necessary implication that a violation shall entail civil liability. In such case, if the legislation or regulation is valid and applicable to the facts of the case, the court must apply it." (See section 285, Comment b.), (Emphasis added.)

Section 286, Restatement 2d, Torts, has been cited with approval in Ross v. Hartman, 139 F.2d 14, 15 (D.C. Cir., 1943) cert. den. 321 U.S. 790 (violation of ordinance requiring vehicles be locked is negligence per se); Peigh v. Baltimore and Ohio R. Co., 204 F.2d 391, 393 (D.C. Cir., 1953)(prohibition against parking boxcar on street for unreasonable time not negligence per se); Whetzel v. Jess Fisher Management Co., 282 F.2d 943, 946 (D.C. Cir, 1960) (violation of housing regulations presented jury questions).

At the outset it must be noted that virtually all cases concerning the issue of negligence per se focus on the question of whether an enactment in providing for criminal liability is to be given any effect in a civil suit. See e.g., Ross v. Hartman, Id. , Peigh v. Baltimore and Ohio R. Co., Id., Whetzel v. Jess Fisher Management Co., Id.

In the case at bar, no such inquiry is necessary. Section 7-1434 clearly was designed for the purpose of protecting the interests of

persons injured by the "operation of the electrical equipment" by requiring that "railroad companies shall be liable for any accident to, or injuries sustained by, any person by reason of any act or omission...." The standard to determine liability is absolute, i.e., "by reason of any act or omission." It is not conditioned on the finding of a lack of ordinary or special care but merely upon the happening of "any act or omission." Once such an event occurs, a defendant railroad "shall be liable."

As Comment (b) to Section 285 and Comment (c) to Section 286, Restatement 2d, Torts both provide, when faced with a statute prescribing civil liability, "the courts must apply it."

As Professor Prosser notes:

> "Statutes, however, in many states have restored the rule of strict liability in certain very dangerous situations as where a fire is set during a specified dry season, or a prairie fire is started intentionally. A very common type of statute makes railroad companies strictly liable, without negligence, for fires

> set by their locomotives, or provides that the fire shall be "conclusive" as to negligence, which of course amounts to the same thing. Such statutes have been held constitutional, as reasonable measures for the protection of property and the adjustment of an inevitable risk. The only question in such a case is one of whether the fire was in fact started by the locomotive, which is frequently one of circumstantial evidence. Presumptions have been created in many jurisdictions to aid the plaintiff in his proof, based on the passage of an engine shortly before the fire begins, or proof of the emission of sparks, or similar facts." Id., 504-05 (Footnotes omitted)

One example of an application of an express statutory remedy can be found in Daggett v. Keshner, (1954) 284 App. Div. 733, 134 N.Y.S. 2d 524, noted in 40 Corn L.Q. 810. This case held that an express provision for a tort action justified holding the defendant liable for consequences which would not otherwise be "proximate."

By defining the responsibility for electric train operation, Congress recognized the abnormal

risk inherent in the catenary system.

Again, Professor Prosser explains:

> "The type of damage threatened by the conduct which entails strict liability usually is well defined. The keeping of vicious animals involves the risk that human beings or other animals will be attacked, the risk of abnormally dangerous things and activities, such as high tension electricity or blasting, is sufficiently obvious. In general, strict liability has been confined to consequences which lie within the extraordinary risk whose existence calls for such special responsibility." Prosser, Ibid., 517-18. (Emphasis added.)

Under Section 7-1434 it is clearly no defense that defendants are not negligent, since that is clearly outside the purview of the statute. The U.S. Supreme Court has so held in cases involving violations of the Safety Appliance Act, 45 U.S.C. A. Section 2. O'Donnell v. Elgin, Joliet & E.R. Co., 338 U.S. 384, 705 Ct. 200, 94 L.Ed. 187 (1949).

In O'Donnell the question was whether the jury should be instructed that it must find

liability or merely that it may find liability for injuries proximately resulting from the failure of a coupling. The court in reviewing the effect to be given to the breach of a statute noted that "unless the statute sets up a special cause of action for its breach, a violation becomes an ingredient, of greater or lesser weight, in determining the ultimate question of negligence." Id., at 390. Where a statute does set up a cause of action without considering the negligence of a party, as under the Safety Appliance Act, then liability cannot be escaped by a showing of careful or diligent conduct. The Court specifically noted:

> "The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one and the carrier is not excused by any showing of care however assiduous." Brady v. Terminal R. Association, 303 U.S. 10, 15, 82 L.Ed. 614, 618, 58 S.Ct. 426. O'Donnell v. Elgin, Joliet & E.R. Co., 338 U.S. 384, 390-91.

The Trial Court erroneously arrived at the

conclusion that Section 1434 does not impose strict liability, or any liability, on the defendant, reasoning, among other things, that "...in the half-century that Section 1434 has been on the books, no District of Columbia Court has held local railroads strictly liable for electrical injuries to child trespassers; rather common law negligence principles have been applied. 567 F. Supp. at 1100 In no previous case in the District of Columbia has the applicability and interpretation of Section 1434 been more squarely addressed and, indeed, no authoritative binding precedent concerning application and interpretation of Section 1434 has been declared by any Court in or for the District of Columbia.

In the same breath, the trial court urges that "the plain language" of Section 1434 "... speaks not in terms of strict liability, but rather in the language of negligence, thereby invoking traditional concepts of tort law..." and "...plaintiff must prove that an 'act or

omission' has occurred." 567 F. Supp. at 1100 Yet, despite the several depositions, admissions, answers, and exhibits contained in the record which clearly show that the railroad did not take any action whatsoever, to even attempt to reduce or eliminate the unreasonable risk of imminent grevious bodily injury or death to children of the District of Columbia who unknowingly meddle with, or expose themselves to the area made dangerous by, the catenary system, and despite this continuing omission by the railroad throughout the years when numerous children were seriously maimed or killed in the District of Columbia and elsewhere the trial court granted summary judgment against the plaintiff holding Section 1434 not to apply even in the context of "traditional concepts of tort law."

It is pointed out that Section 1434, although enacted by the Congress of the United States, is a part of the public laws governing conduct, including omissions, in the District of Columbia

only, and not in other jurisdictions. Section 1434 imposed, and imposes, a duty on railroads in the District of Columbia, regardless of what may be their duty in other jurisdictions, and, regardless of what other duty or duties are imposed upon them in the District of Columbia by way of other statutory law, case-law, or common-law, including that imposed under Section 339 of the Restatement of Torts (Second).

It is abundantly clear, that under Section 1434 a statutorily created cause of action accrues to a person, and "...railroad companies shall be liable for any accident to, or injuries sustained by, any person by reason of any act or omission of the railroad..." by "...operation of the electrical equipment and apparatus...." (underline added)

In the case at bar, under Section 7-1434, if it can be shown (and it has been, infra.) that an accident or injury occurred to a person by reason of an act or omission of the railroad by its operation of electrical equipment and

apparatus of the railroad trains, then, in that event, a cause of action accrues to the injured person and the railroad company "...shall be liable...."

C. THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT BY DECIDING GENUINE ISSUES OF MATERIAL FACT, CONTRARY TO RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE, AND IN VIOLATION OF PLAINTIFFS' RIGHT TO A TRIAL BY JURY OF THE FACTUAL ISSUES DISPOSITIVE OF THE LITIGATION.

Under Rule 56(c) of the Federal Rules of Civil Procedure, upon proper motion, summary judgment "...shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (underline added)

Conversely stated: If the pleadings, depositions, answers to interrogatories, and admissions on file show that there is a genuine issue as to any material fact or that the moving party is not entitled to a judgment as a matter of law, then summary judgment shall not be rendered.

In Schmid v. Frosch, 680 F.2d 248 (D.C. Cir., 1982), the Court stated:

> "It is well settled that summary judgment should only be granted if the pleadings, depositions, affidavits and admissions filed in the case 'show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Fed. R. Civ. P 56(c); see Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 467, 82 S.Ct. 486, 488, 7 L.Ed.2d 458 (1962); National Life Insurance Company v. Silverman, 454 F.2d 899, 908 (D.C. Cir. 1971).

In this regard, also see Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396, n. 8 (1982), citing Poller, supra.

Rule 56 has built into it "...any significant probative evidence" as the test to be applied, per Poller, supra, as was recognized in Proctor v. State Farm Mutual Auto Ins. Co., 675 F.2d 308 (D.C. Cir. 1982). Although Poller involved summary judgment disposition in an antitrust case, the lessons from Poller are applicable to the instant case.

> "Similarly, lower courts have often sought to dispose of complex antitrust cases through the use of

summary judgment. In Poller v. CBS, Inc., 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962), the Court strongly disapproved of resort to summary disposition." 675 F.2d at 344

Further the Poller Court stated, as recited in Proctor at page 344:

> "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice." Poller, 368 U.S. at 473, 82 S.Ct. at 491 (footnote omitted)
>
> "Poller established a "rigorous standard" for summary judgment. 10 C. Wright & A. Miller, Federal Practice and Procedure Section 2732 at 609 (1973). Where "motive and intent play leading roles," 368 U.S. at 473, 82 S.Ct. at 491, courts should avoid summary dispositions. On the other hand, the Court has indicated that where the law is "so well developed that *** the gist of the case turns on documentary evidence the rule at times can be divined without a trial."

White Motor Co. v. United States, 372 U.S. 253, 259, 83 S.Ct. 696, 9 L.Ed.2d 738 (1963)."

The instant case is on all fours with the following proposition of law enunciated in Proctor at page 345:

> "The inappropriateness of summary judgment is magnified by the fact that the District Court chose not to discuss the state of the record, even though motion papers before the court had dealt with the existence of the horizontal agreement. Instead, we deal here with a more egregious practice: summary disposition by a Court of Appeals based on its own review of several volumes of lifeless record. Appellate courts are hardly well-suited to this task."

In Davis v. Chevy Chase Financial Limited, 667 F.2d 160, 169 (D.C. Cir., 1981) the Court stated:

> "When reviewing a grant of summary judgment, we are, of course, obliged to view the record in the light most favorable to the party opposing the motion and to resolve all questions of inference in favor of the party. Fed. R. Civ. P. 56(c); Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962); Mazaleski v. Truesdell, 562 F.2d 701, 717 (D.C. Cir. 1977)."

The trial court impermissibly resolved factual disputes by finding that children would not "likely" be found near the catenary wire at the Sousa Bridge. That was a jury question, whether children would be likely to be found near the catenary wire, especially at an area in the city, urbanized, heavily travelled, close to a marina, and travelled highway where people used a footpath across the tracks to go fishing close to the tracks. This is particularly true where there was a wire with 12,000 volts in it close to this area, unfenced and unsigned to warn children of the fatal danger of the wire.

"Summary judment is unavailable if it depends upon any fact that the record leaves susceptible of dispute." See National Association of Government Employees v. Campbell, et al., 593 F.2d 1023 (D.C. Cir. 1978) with particular emphasis on headnotes 4, 5, and 8 at pages 1027, 1028, 1029 as well as cases at footnotes 32 through 36 and footnotes 51 through 53.

The decision of Judge Oberdorfer flies in the face of National Association of Government Employees, supra, especially in light of the language of Chief Judge Robinson who wrote: "...In assessing the motion, all inferences to be drawn from the underlying facts contained in [the movant's] materials must be viewed in the light most favorable to the party opposing the motion." ...Indeed, "the record must show the movant's right [summary judgment] 'with such clarity as to leave no room for controversy,' and must demonstrate that his opponent 'would not be entitled to [prevail] under any discernible circumstances.'" Id at 1027 (underline added)

The trial judge violated the requirements of National, supra, and the appellate Court's decision incorporating Judge Oberdorfer's decision voids the law in National or at a minimum puts the law in the District of Columbia Circuit in conflict.

In this same vein, see Merit Motors, Inc., et al. v. Chrysler Corporation, 569 F.2d 666 (D.C. Cir., 1977), in which then Chief Judge Bazelon joined by Judges Wright and Robb stated the following:

> "I. THE STANDARD FOR SUMMARY JUDGMENT
>
> Under Rule 56(b) of the Federal Rules of Civil Procedure, a defending party 'may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part' of a claim against him. Rule 56(c) provides that '[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' The burden of proving that there is no genuine issue as to any material fact is on the moving party, but once the moving party has submitted a properly supported motion for summary judgment, Rule 56(c) requires the opposing party to produce at least some credible evidence beyond the pleadings in response." Footnote 3 is reproduced in total due to its importance in this regard, on the standards to be used in ruling on a motion for summary judgment.

"3. The full text of Rule 56(e) reads:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." (Emphasis added) Id. at 668, n. 3

In Abraham v. Graphic Arts International Union, 660 F.2d 811 (D.C. Cor., 1981), Chief Judge Robinson reversed the granting of a summary judgment at the District Court and said, inter alia:

"...Summary judgment is appropriate only on demonstration 'that there is no genuine issue as to any material fact and that the moving party is

> entitled to a judgment as a matter of law.' The court's function is not to try disputed issues of fact, but only to ascertain whether such an issue is present, and any doubt on that score is to be resolved against the movant. Since it is he who bears the onus of establishing his entitlement to summary judgment, his opponent enjoys the benefit of all favorable inferences from the evidence proffered, moreover, facts asserted by the non-movant, if adequately buttressed by evidentiary material, are to be taken as true. These canons apply as forcefully on appellate review as earlier they did at the trial level." Id. at 814, 815

See numerous cases cited in footnote 29 at page 815 of Abraham, supra; also see the language within footnote 29:

> "...The record on appeal is to be read in the light most advantageous to the party resisting summary judgment ...When properly supported, his evidentiary claims are to be accepted,...as are his versions of the operative facts....The appellate court must determine whether there was any issue of fact material to the summary judgment awarded, and if so must reverse it.... Substantive decisionmaking is limited to questions of law, see Fed. R. Civ. P 56(c), and resolution of factual disputes is taboo."

Of course "the record" includes depositions, on file at the time of the ruling.

Upon review of the depositions, it will be obvious that the appellants "survived the rigors of demonstrating the potential for a prima facie case at trial." For language on this subject, see, in comparison, page 817 of Abraham, at which point the Court said:

> "Appellant was entitled to all favorable inferences afforded by the record, and to the benefit of any doubt as to the propriety of summary judgment for the union. Since the record, in present shape at least, does not establish indisputably that appellant was unqualified for the redefined position, or that her handling of the leave problem was unreasonable, the work absence incidental to her impending motherhood loomed as a likely explanation for her discharge. Given that, we conclude that appellant survived the rigors of demonstrating the potential for a prima facie case at trial."

As in Abraham, supra the "evidence" in the "record" in the Edwards case "was not free from dispute"; see headnote 10, page 820:

> "The insurmountable difficulty, however, is the evidence on that point was not free from dispute."

Chief Judge Robinson, in reversing in Abraham, supra, said,

> "We find, then, that the union has not demonstrated either its right to judgment 'with such clarity as to leave no room for controversy,' or that appellant 'would not be entitled to [prevail] under any discernible circumstances.' The judgment appealed from is accordingly reversed, and the case is remanded to the District Court for further proceedings consistent with this opinion. So ordered." Id at. 820

Footnotes 76 and 77 in the Abraham case contain citations of important cases on the subject of Rule 56 and should be consulted.

> "Nyhus v. Travel Management Corp., supra note 23, 151 U.S. App. D.C. at 271, 466 F.2d at 442, quoting Semaan v. Mumford, 118 U.S. App. D.C. 282, 283 n. 2, 335 F.2d 704, 705 n. 2 (1964)- in turning quoting Taylor v. Black, Sivalls & Bryson, Inc., 189 F.2d 213, 216 (8th Cir. 1951).

Also see McSurely v. McClellan, 697 F.2d 309 (D.C. Cir. 1982) as herein it is said:

> "When considering a motion for summary judgment, a trial court's function is to ascertain whether disputed facts exist, not to try them. Abraham, 660 F.2d at 814.

[Abraham v. Graphic Arts International Union, 660 F.2d 811, 814 (D.C. Cir. 1981) ....' Weiss v. Kay Jewelry Stores, Inc., 470 F.2d 1259, 1261 (D.C. Cir. 1972). Furthermore, in determining whether a claim is ripe for summary disposition, courts resolve any doubts against the movant. They accord the opposing party all favorable inferences that may be drawn from the proffered evidence and take as true all adequately supported facts presented by the opposing party. Id.; Bouchard v. Washington, 514 F.2d 824, 827 (D.C. Cir. 1975). On appeal, we determine only whether the District Court abused its discretion in denying a motion for summary judgment. Poller v. CBS, 368 U.S. 464, 473 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962); Abraham, 660 F.2d at 814-15; see Harlow -- U.S., at --, 102 S.Ct. at 2737 n. 26." Id. at 321

Look at footnote 20 in McSurely, supra, on page 321:

"Harlow does not purport to change the operation of Rule 56 in immunity cases. The Harlow Court discarded the subjective aspect of the good faith defense to avoid routine conflict with the rigors of Rule 56. This significantly reduces the potential for factual disputes; however, such disputes may arise even under the objective test. Whether an official should have known that his action violated the law -- the example postulated in Harlow --

> can be judged without recorse to the trier of fact when the question essentially is one of law. However, when there is a genuine issue of fact -- for example, what a reasonable person in like circumstances should have known -- Rule 56 compels a trial."

Should the officials of Conrail have placed warning signs of high voltage electricity at or near the Sousa Bridge? Is that a question of fact?

In Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, at pages 2737; 2738 the Supreme Court said, among other things:

> "Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment."

Footnote 26 stated at page 2737:

> "The Rule states that summary judgment 'shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'

> Fed. R. Civ. P 56(c). In determining whether summary judgment is proper, a court ordinarily must look at the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party. E.G. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 82 S.Ct. 486, 491, 7 L.Ed. 2d 458 (1962)."

On an official's state of mind, the Supreme Court said, at pages 2737 and 2738:

> "And on official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury."

The excerpt from footnote 29 on page 2738 is illuminating also:

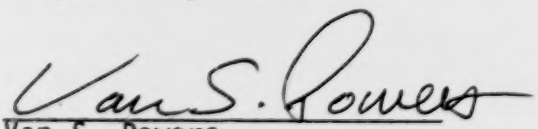
> "...A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standard, be sufficient [to force a trial].... The effect of this development upon the willingness of individuals to serve their country is obvious."

The record in this case has ten (10) depositions of former or current (when deposed) employees of Conrail and its predecessor railroads, and in all

of those depositions there are dozens of evidentiary statements placing the issue of notice squarely before the jury along with the issue of failing to post adequate warning signs at the location of the child's injuries on July 7, 1979. In spite of these entries in the record, Judge Oberdorfer refused to note the existence of genuine disputes as to material facts and improperly granted summary judgment.

The Writ of Certiorari should issue.

Respectfully Submitted,



Van S. Powers
Attorney for Petitioners
4344 Farragut Street
Hyattsville, Maryland 20781
301 277-3311

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit with Appendix were hand-delivered to the offices of Hamilton and Hamilton, 734 15th Street, Washington, D.C. 20005, for James B. Sarsfield, Esquire and Stephen A. Trimble, Esquire, attorneys for defendant Consolidated Rail Corporation, on this 13th day of August, 1984.

Van S. Powers

Van S. Powers
Attorney for Petitioners
4344 Farragut Street
Hyattsville, Maryland 20781
301 277-3311

APPENDIX

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EDWARDS v. CONSOLIDATED RAIL CORPORATION
567 F. Supp. 1087
(1983)

MEMORANDUM ON SUMMARY JUDGMENT

OBERDORFER, District Judge.

On July 7, 1979, plaintiff Eldee Edwards, Jr. (hereinafter "plaintiff"), who was 11 years old at the time, climbed on top of one of defendant's trains and was seriously injured by exposure to a high-voltage electric wire ("Catenary wire") that was suspended 18½ feet above the tracks and supplies power to defendant's through trains. Invoking federal diversity jurisdiction, plaintiff and his father instituted this action through their guardian ad litem, plaintiff's grandfather. They seek $250,000 in special damages on behalf of the plaintiff's father, and $20 million in compensatory damages and $50 million in punitive damages on behalf of the child. Six months of discovery are now complete and the facts and law have been well developed in pretrial pleadings.

Defendant now moves for a summary judgment that the undisputed material facts establish that it cannot be held liable in this case as a matter of law. Plaintiffs have opposed the motion, and a hearing on motion was held on May 15, 1983.

Plaintiff suffered tragic and serious injuries when he was shocked by defendant's catenary wire. Nevertheless, as explained below, the accompanying Order will grant defendant's motion on the authority of Section 339 of the Restatement (Second) of Torts (1965), which is controlling in this jurisdiction under the en banc decision in Holland v. B&O R. Co., 431 A.2d 597 (D.C. Ct. App. 1981).[1] In brief, the following facts are undisputed:

(a) plaintiff trespassed onto the track area and train where he was injured;

(b) children trespassing by bicycle on the site where plaintiff was injured, including plaintiff, were not deterred by the "no authorized vehicle signs" posted along the only access road

to the site or by "no trespassing" signs stencilled on each catenary wire pole;

(c) the wire which caused plaintiff's injury was suspended 18½ feet above the tracks and was "ordinarily inaccessible." Plaintiff's Pretrial Brief (filed April 19, 1983) at 195;

(d) only "through trains" use the tracks where plaintiff was injured, and the only possible means of access to the catenary wire was by climbing onto one of defendant's through trains during the brief and random minutes when the trains must occasionally stop there for a signal;

(e) the Secretary of Transportation has plenary authority to require fencing and additional posting at such sites, but has conspicuously refrained from doing so; and

(f) defendant has voluntarily fenced its rail yards and tracks or "de-energized" its catenary wires at other urban sites where the catenary wires are more accessible to trespassing children.

Based on these undisputed facts, a rational jury could come to only certain conclusions under Section 339:

(1) that defendant neither knew nor had reason to know that the wire 18½ feet above the tracks at the site where plaintiff was injured would be accessible or involved an "unreasonable risk" of harm to trespassing children (Restatement Section 339(b));

(2) that the utility of the catenary wire and the burden of "eliminating" the risk of injury from it are not "slight" compared with the risk that a through train would stop at that place long enough for a trespassing child to climb on top of the train and be injured by the wire (Restatement Section 339(c)); and that

(3) defendant had no statutory or common law law duty under federal or District of Columbia law to fence, place guards, or post more signs at the site where plaintiff was injured to protect against a tragic incident such as the one at issue

here, and was exercising "reasonable care" in its maintenance of the site (Restatement Section 339(e)).

A motion for summary judgment may be granted only when "there is no genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law." F.R. Civ. P. 56(c). The undisputed facts and "inferences to be drawn" from those facts "must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962) (per curiam). "The court may not weigh or resolve issues of fact," Rodway v. United States Department of Agriculture, 482 F.2d 722 (D.C. Cir. 1973), and to support summary judgment the record "must demonstrate that [the] opponent 'would not be entitled to [prevail] under any discernible circumstances.'" National Ass'n of Governmental Employees v. Campbell, 593 F.2d 1023, 1027 (D.C. Cir. 1978) (quoting Semaan v.

Mumford, 335 F2d. 704, 705 N. 2 (D.C. Cir. 1964)). See also International Underwriters, Inc. v. Boyle, 365 A.2d 779, 782 (D.C. App. 1976) (summary judgment standards in District of Columbia).

Rule 56 also requires that when a motion for summary judgment is filed that is adequate to support judgment, an opposing party must specifically defend against that motion. Rule 56(e) provides that, in such a case, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response...must set forth specific facts showing that there is a genuine issue for trial." F.R. Civ. P. 56(e). As our Court of Appeals has stated, "in order to raise a material issue of fact..., more is necessary tha[n] mere assertions in the pleadings." Bloomgarden v. Coyer, 479 F.2d 201, 208 (D.C. Cir. 1973); cf. National Ass'n v. Campbell, supra, 593 F.2d at 1029. Summary judgment on issues that are more often left for a jury is generally appropriate "where the facts are undisputed and

only one conclusion may reasonably be drawn from them." Flying Diamond Corp. v. Pennaluna & Co., Inc., 586 F.2d 707, 713 (9th Cir. 1978); accord Bloomgarden v. Coyer, supra, 479 F.2d at 212 (summary judgment appropriate where there is "no basis on which a jury could rationally find" otherwise); Quinto v. Legal Times of Washington, 506 F. Supp. 554, 564 (D.D.C. 1981) (summary judgment appropriate "where only one inference is possible from the evidence"). See pp. 1112-1114, infra.

In furtherance of Rule 56(e), this judicial district has enacted Local Rule 1-9(h), which provides as follows concerning the obligation to defend against summary judgment with specificity:

With each motion for summary judgment...there shall be served and filed...a statement of the material facts as to which the moving party contends there is no genuine.... A party opposing such a motion shall serve and file...a concise "statement of genuine issues" setting forth all

material of facts as to which it is contended there exists a genuine issue necessary to be litigated, and shall include therein references to the parts of the record relied upon to support such statement. In determining a motion for summary judgment, the court may assume that the facts as claimed by the moving party in his statement of material facts are admitted to exist except as and to the extent that such facts are controverted in a statement filed in opposition to the motion. (Emphasis supplied.) Plaintiffs' counsel has not filed the statement required by Rule 1-9(h), and his six-page opposition to defendant's comprehensive motion merely restates plaintiffs' legal contentions, without referring to any specific facts.

Our Court of Appeals has made it clear that "failure to file a proper Rule 1-9(h) Statement... may be fatal to the delinquent party's position." Gardels v. Central Intelligence Agency, 637 F.2d 770, 773 (D.C. Cir. 1980). Yet when the Court

called the failure to counsel's attention at the argument on the motion for summary judgment, he simply acknowledged his failure, stating that "we felt that perhaps we should refer, by incorporation, to other pleadings filed." Transcript at 46 (May 16, 1983). He has not subsequently designated specific facts that may exist in the record or in his 225-page Pretrial Brief to point out material issues which remain disputed and would preclude summary judgment. In Gardels, supra, our Court of Appeals stated that courts may require "strict compliance" with Rule 1-9(h), and that its "purposes clearly are not served when one party... fails in his statement to specify the material facts upon which he relies and merely incorporates entire affidavits and other materials without reference to the particular facts recited therein which support his view." 637 F.2d at 773.

Were this case not so tragic and it was not an injured infant plaintiff who would suffer from counsel's failure, summary judgment could be

granted for defendant on this procedural failure alone, as defendant's motion and 1-9(h) statement are more than adequate to justify such a ruling. Because of these special circumstances, however, the Court has conducted an independent and detailed review of the record, including the filed depositions, discovery responses, pleadings and plaintiff's overlong and largely unhelpful Pretrial Brief.[2] The facts as presented below reflect the Court's best judgment as to the most favorable case that plaintiffs could draw from the record. See Habib v. Raytheon C., 616 F.2d 1204, 1208 (D.C. Cir., 1980). Evidence presented by defendant that has not been challenged is accepted as true, but the Court has disregarded any facts proffered by defendant for which a contest is factually suggested anywhere in the record. Even after this exhaustive review of the record, the Court is convinced that plaintiffs could not prevail were a jury to hear the undisputed facts, and that defendant must be granted

judgment as a matter of the law governing in the District of Columbia.

FACTS

On the afternoon of July 7, 1979, the 11-year-old minor plaintiff and three friends of the same general age[3] rode on their bicycles to the railroad tracks which lay between RFK Stadium and the Anacostia River, east of the Sousa Bridge, in the District of Columbia. They rode to the stadium, through the stadium parking lot, and onto a path or road. Plaintiffs' Pretrial Brief at 183. They passed a sign at the entrace to that road that bore the words "No Unauthorized Vehicles." One of the plaintiff's friends saw the sign; plaintiff did not. Brown Deposition at 10; Eldee Edwards, Jr. Deposition at 22. They followed the road for about one-half mile (Brown Deposition at 10) past the D.C. Jail, behind the D.C. General Hospital, behind a fenced cemetery and down toward defendant's railroad tracks. They then came to a grassy area. Beyond this grassy area lay the railroad tracks;

on the far side of the tracks was another grassy area and then the Anacostia River.

A train was stopped on the tracks, extending beneath the bridge and awaiting clearance for passage through the Virginia Avenue tunnel. Plaintiff and two of his friends rode their bicycles off the road and over the grass next to the tracks and dismounted.[4] Accepting plaintiff's testimony as true, this train had been stopped there when the boys arrived; the train was stopped there for about twenty minutes prior to the accident.[5] All three boys climbed up ladders on the sides of the railroad cars. Wayne Childress and Andre Stukes climbed up the ladders but not onto the top of the railroad cars; Childress put his head above the roof level of a car, and Stukes climbed up the ladder only "half-way." Childress Deposition at 17; Stukes Deposition at 31. Stukes stopped "[b]ecause I was scared, I was afraid it was too high up there. I was afraid I was going to fall." Stukes Deposition at 31.

Plaintiff was still climbing a car when the other two boys had finished climbing.[6] Unlike the other two boys, plaintiff climbed all the way onto the top of a car, and stood up. He walked around a little, became "a little dizzy," and started to leave. Edwards Deposition at 44, 47. Plaintiff remembers that Stukes said to him "Come on. Let's go." Id. Both Childress and Stukes told plaintiff not to climb onto the last car; Stukes stated that he was afraid of falling and said to plaintiff "Get down, man, before you fall." Stukes Deposition at 32; see id. at 36; Childress Deposition at 19, 32. All three boys stated in deposition that they neither thought about nor realized the danger in the wires.[7]

As plaintiff decided to leave the top of the railroad car, he either grabbed or came quite close to the catenary wires, which were near his head or shoulder level.[8] In any case, "[s]omething went 'Pow,' there was a red flash and...[plaintiff] was laying across the train, injured." Childress

Deposition at 24. He then apparently rolled or fell from the top of the railroad car to the ground next to the tracks, landing on top of one of the bicycles. Stukes Deposition at 56-57. He was severely burned and injured, and has received extensive medical treatment for his injuries. The boys stated that only a few minutes elapsed from when they began to climb the cars until plaintiff was injured.[9]

This was the sixth time that plaintiff had bicycled through this area. His friends had also visited there before on different occasions. They had seen other boys on bicycles there, as well as fishermen along the river and cars on the road from the stadium. Clarence Riddick, who had fished at the site intermittently for over a decade, had also seen children and adults in the area on numerous occasions. Riddick Deposition at 31-34. The area itself, however, appears to be isolated as far as residential housing located directly at the site is concerned. See Defendant's Statement

of Material Facts as to which There is No Genuine Issue (hereinafter "Defendant's 9(h) Statement"), Exs. B, C & D (photographs of the site) (filed April 25, 1983). For purposes of summary judgment, this record indicates that the adults and children trespassed in the area not infrequently for recreational purposes.[10]

Plaintiff and his friends stated that they had never seen a standing train on the tracks in their previous visits to this area. Thus they had never before climbed on a train there (or anywhere else by their testimony). They all stated in deposition that they did not consider trains dangerous, and that they were not aware of the electrical danger contained in the catenary wires above the tracks, although they had seen the wires.

The tracks at the point of the incident are "mainline" or "through" tracks. Twenty to twenty-eight through trains pass there every day. Trains are not stored, loaded or switched in the area nor are there side tracks there for such purposes.

Trains stop there only en route when required by signals for operational purposes of the railroad.[11]

The high-voltage catenary wires supply defendant's trains with electric power through devices mounted atop the electric locomotives. Of necessity, the wires are not insulated. This catenary system has been in place above railroad tracks in Washington, D.C., since the mid-1930s. At the site where plaintiff was injured, the wires are suspended 18½ feet above the ground, and are "ordinarily inaccessible." Plaintiffs' Pretrial Brief at 195. At bridges or ground-level storage areas and other places where catenary wires would be accessible to pedestrians, defendant has either erected fences or cement walls, or "de-energized" the wires (i.e. turned off the current). Otherwise, the wires are suspended out of normal reach.[12] See Defendant's 9(h) Statement 14; Plaintiffs' Pretrial Brief at 16, 19-20 (summarizing testimony of witnesses Ginter and Shertzer). On the poles from which the catenary

lines are suspended the words "No Trespassing" have been stencilled; these words were faded or rusted so as to be obscured in some places.

Certain facts regarding railroad safety requirements and defendant's complianace with them are also undisputed. First, in 1970, Congress enacted the Railroad Saftey Act, 45 U.S.C. Sections 421, 431-444 (1976 & Supp. V 1981), Pub.L. 91-458, 84 Stat. 971 (Oct. 16, 1970) (hereinafter "the Act"). Congress's expressed purpose in enacting the Act was "to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons...." 45 U.S.C. Section 421. The Act gave broad investigative, regulatory and enforcement powers to the Secretary of Transportation, see id., Sections 431-440, who in turn delegated authority to the Federal Railroad Authority ("FRA") to implement and administer the Act. See generally United Transportation Union v. Lewis, 711 F.2d 233 (D.C. Cir. 1983). One section of the Act

required the Secretary to submit to the President and Congress "a comprehensive study of the problem of eliminating and protecting railroad grade crossings, including a study of measures to protect pedestrians in densely populated areas along railroad rights-of-way, together with his recommendations for appropriate action." 45 U.S.C. Section 433(a) (emphasis supplied). The Act gave the Secretary authority to develop and implement solutions to these safety problems, see Sections 433(b), 437, but, in commenting on the need for safety regulations, the House Committee noted that it had "no intention to induce the Department [of Transportation] to prescribe regulations which will later turn out to be impractical or impossible." H.R. Rep. No. 91-1194, 91st Cong., 2d Sess. 18, reprinted in 1970 U.S. Code Cong. & Admin. News 4104, 4115.

The required report was filed in 1972. Federal Railroad Administration, Report to Congress, Railroad-Highway Safety Part II:

Recommendations for Resolving the Problem (U.S. Dept. of Transportation) (August 1972) (partial copy attached as Ex. A to Defendant's 9(h) Statement). Although the FRA had considered fencing and posting of signs at railroad rights-of-way as a possible solution to the problem of pedestrian deaths and injuries, including catenary injuries (ee id. at 52), it expressly declined to recommend these alternatives to Congress. Id. at 53, 56-57. Instead, it reported the expense that would be involved in fencing some 30,000 miles of urban rights-of-way ($2.3 billion in 1972), noted the lack of assurance that fencing would be effective in preventing pedestrian access, and suggested further study before specific regulations were enacted. Id. at 55-57. The problem of catenary injuries to trespassers was noted in one sentence in the 108-page report, id. at 52, but no specific solutions were suggested, let alone adopted. No regulations to require fencing or signing have been promulgated subsequently by the FRA, and

Congress has not imposed any such statutory requirements, even though it has twice amended the Act (in 1976 & 1980).[13]

It is also undisputed that the District of Columbia has not enacted any fancing requirements or other safety regulations for railroad rights-of-way or catenary wires within the District, despite the fact that the Act expressly preserves the power of state authorities to regulate local railroad safety problems. See 45 U.S.C. Section 434.

Moreover, it is also undisputed that despite the absence of statutory or regulatory requirements, defendant has voluntarily instituted an active safety protection program in areas where trains are stored or where catenary wires come into normal reach. Defendant's voluntary actions in this regard have included construction of fences and walls, posting of "high-voltage" warning signs, and de-energizing of the catenary wires. See Plaintiffs' Pretrial Brief at 13-14, 16, 19-20 (summarizing testimony of witnesses Feeley, Beyer,

Ginter and Shertzer); Hasselman Deposition at 24-25, 42-43, 86; Defendant's 9(h) Statement, 14. Thus it is undisputed that defendant was in compliance with all existing federal and local safety requirements at the site and on the date of plaintiff's accident, and that throughout its railroad system defendant has gone beyond statutory requirements in the area of catenary safety.

Finally, plaintiffs have proffered uncontested evidence that electrical injuries to minors caused by the catenary wires above railroad tracks have occurred in the past.[14] According to plaintiffs, from 1975 through August 1979 throughout the "northeast corridor" of the Amtrak system (encompassing Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland and the District of Columbia), 101 electrical injuries to trespassers on railroad cars have been reported. Eighty-six of these have been to minors. Seven such incidents have occurred since 1968 within three miles of the point at which plaintiff was

injured; two of these happened within one-half mile of the spot. Plaintiffs' Pretrial Brief at 3-8.

For reasons explained more fully below, infra at n. 15 and pp. 1096-1097, only the two prior accidents involving minors that occurred near the site where plaintiff was injured are even arguably material here.[15] In March 1973, William S. Fearing was injured by catenary wires while climbing on a railroad car which may have been stationary "a few hundred yards north" from the site of plaintiff's accident. Plaintiffs' Pretrial Brief at 5.[16] In June 1968, seven-year-old Jeffrey Windom (now Jeffrey Harrison) was injured when he climbed a standing railroad car and came into contact with the catenary wires within three-tenths of a mile of the same site. Plaintiffs have proffered no more specific evidence regarding the circumstances of these two accidents, although the Court has examined Windom's deposition.

An additional undisputed fact is that in

subsequent litigation of the Windom incident, Judge Richey of this Court granted a directed verdict in favor of the defendant railroad, Penn Central; that judgment was affirmed on appeal. Windom v. Penn Central, No. 479-72 (D.D.C. Feb. 21, 1973) (partial transcript attached to Defendant's Memorandum in Support). aff'd without opinion, 494 F.2d 1157 (D.C. Cir. 1974). In his decision rendered from the bench in Windom, Judge Richey noted that "railroads...are not insurers of property" and need not "endure unbearable burdens to maintain [their] property or a railroad line." Id., transcript at 412. He therefore granted judgment as a matter of law, holding that the railroad had not breached its duty of reasonable care, and that "the issue of reasonableness is for the court because of the uncontroverted facts in this case which permit only a single inference to be drawn." Id. at 414-15.

By analogy to the reasoning in Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817,

82 L.Ed. 1188 (1938), federal courts in the District of Columbia exercising diversity jurisdiction must apply the substantive law of the District as announced by its highest court. Steorts v. American Airlines, Inc., 647 F.2d 194, 196-97 (D.C. Cir. 1981); Lee v. Flintkote Co., 593 F.2d 1275, 1278-79 n. 14 (D.C. Cir 1979). Analysis of this case must therefore begin with consideration of the en banc decision of the District of Columbia Court of Appeals in Holland v. B&O Railroad Co., 431 A.2d 597 (D.C. Ct. App. 1981).

The Holland decision resolved a long controversy concerning the applicable standard of liability in the District of Columbia for landowners in cases of injury to trespassers. In 1953 the United States Court of Appeals for the District of Columbia (sitting as the highest court in this jurisdiction) adopted the strict common law standard that trespassers may recover only in cases of "intentional, wanton or willful injury."

Firfer v. United States, 208 F.2d 524, 528 (D.C. Cir. 1953). In 1972, however, the United States Court of Appeals suggested that common law distinctions between trespassers and other persons were "alien to modern tort law," and that a single standard of "reasonable care under the circumstances" should be applied in cases of injury to any person when present on another's land. Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97, 100-101 (D.C. Cir. 1972). In Holland, a nine-year-old boy was injured by a moving train while trespassing on the unfenced tracks of two railroads. The trial court had granted summary judgment in favor of the railroads, relying on the strict standard of Firfer; on appeal, the plaintiff argued that the less stringent standard of Arbaugh's should have been applied.

The District of Columbia Court of Appeals rejected the plaintiff's argument, both as a matter of precedent and as a matter of law. First, on February 1, 1971, the courts of the District

of Columbia had been reorganized, and after that date the United States Court of Appeals was no longer the binding arbiter of District of Columbia law. The D.C. Court of Appeals held in Holland that, because Arbaugh's was decided by the U.S. Court of Appeals after the date of reorganization (and, incidentally, because Arbaugh's facts did not involve a trespasser), the decision was not controlling and the Firfer decision remained the law of the District. Holland, 431 A.2d at 600; see M.A.P. v. Ryan, 285 A.2d 310, 312 (D.C. App. 1971). The Holland court therefore rejected "[t]he attempt in Arbaugh's to rewrite the general law of tort liability of landowners in the District of Columbia." 431 A.2d at 600. Second, after consideration of the differing standards of liability set forth in Firfer and Arbaugh's, the en banc court refused to abandon common law distinctions between trespassers and other entrants onto land. "In this jurisdiction, trespassers may, generally speaking, only recover from landowners

for injuries that were willful, wanton, or that resulted from maintenance of a hidden engine of destruction." Holland, 431 A.2d at 601.

Having made the decision to adhere to the strict common law standard of recovery for trespassers cases, the Holland court then went on to consider whether an exception to the rule might apply in the case before it. Because the case involved a minor, the court authoritatively stated that the "narrow exception" of the "attractive nuisance" doctrine, as spelled out in Section 339 of the Restatement (Second) of Torts, could be invoked.[17] That section, however, was to be "strictly applied, and [permits liability] only when all five elements of the section [Section 339] are satisfied." Id. at 602. Applying Section 339 to the facts in Holland, the court held that "a moving train is a danger so obvious that any nine-year-old child allowed at large would readily discover it and realize the risk involved." Id at 603. Therefore, the court ruled that as a matter

of law under Section 339(c), no trespassing minor can recover for injuries caused by a moving train in the District of Columbia. The grant of summary judgment for the railroad was consequently affirmed. Id.

Having decided that requirement (c) of Restatement Section 339 was not satisfied, the Holland court stated that it was "unnecessary to consider whether other elements of" Section 339 were also satisfied. Id. at 603 n. 11. The court noted, however, that

> courts have consistently held that in the absence of statutory requirements[,] railroads are generally under no duty to erect fences or maintain other safeguards and that, therefore, allegations [in a child-trespasser case seeking recovery on the basis of a failure to safeguard railroad tracks] do not satisfy the requirements of the Restatement rule.

Id. This observation made by the highest court

in the District of Columbia sitting en banc, while undeniably dictum, is still entitled to considerable weight in this Court in the absence of more direct statements of local law.

Three judges dissented in Holland, and their views complete the picture of the current state of local law in this type of case. The dissenters' basic point was that, although the particular plaintiff in Holland might not have stated facts sufficient to recover under Section 339, "rigid" legal rules barring individual consideration of future cases should not be stated. For this reason the dissenters recommended that

> each case concerning a child trespasser and a railroad should...be decided on its facts under Restatement Section 339,... leaving it to the trial court to grant summary judgment, direct a verdict, or enter judgment notwithstanding the verdict whenever the facts assuredly favor the railroad.

Id. at 605 (Ferren, A.J., dissenting). The

dissenters argued that "not every child at large... will appreciate the danger of a train in every setting," and that although "in many if not most locations the addition of warning signals or fences...would do little to cut down the risks while costing a prohibitive sum," there could be "other locations where the value of additional safeguards might outweigh the costs of installing them." Id. at 604.

Consideration of both the majority and the dissenting opinions in Holland leads to several conclusions concerning the present state of District of Columbia law. First, the general rule remains that the trespassers cannot recover unless a landowner's injurious conduct has been "willful or wanton." Second, the "narrow exception" of Restatement Section 339 remains available to minors who trespass in the District of Columbia, but that section is to be "strictly applied." Finally, "in many if not most locations," railroads have no duty in the absence of statutory

requirement to fence their rights-of-way. To these three points, at least, agreement of the en banc Holland court was unanimous.

Before addressing the application of Section 339 to plaintiffs' facts here, defendant and plaintiffs attempt to claim judgment at a matter of law on the basis of various federal and District of Columbia statutes relating to railroads. Defendant argues that any local common law remedy that plaintiffs might otherwise have has been preempted by Congress's decision to provide for uniform federal regulation of railroad safety via the 1970 Railroad Safety Act, supra, p. 1095, and the decision made pursuant to that Act by the Secretary of Transportation to require neither fencing nor other safeguards at urban railroad rights-of-way such as the one at which plaintiff was injured. At the other extreme, plaintiffs contend that D.C. Code Section 7-1434[18] renders defendant strictly liable for injuries caused by its catenary system.

Although it would seem that the D.C. Court of Appeals' decision to apply common law principles in Holland necessarily rejected defendant's preemption argument sub silentio, both arguments will be briefly discussed here. Neither argument provides a convincing basis for judgment in this case, although as more fully discussed below, see infra, p. 1112, the regulatory decisions made by the Secretary of Transportation under the Act and defendant's compliance with all those decisions as well as all local safety regulations does bear on the reasonableness of defendant's actions for purposes of Restatement Section 339 (e).

A. Strict Liability

Sections 1430-35 of Title 7 of the D.C. Code were enacted by Congress in 1934 as one bill, granting authority to the steam railroads then operating within the District of Columbia "to electrify their lines...with an alternating current overhead catenary or other type of electrification system." D.C. Code Section 7-1430,

Act of March 27, 1934 (Pub. Law No. 73-137, 48 Stat. 506-507). Section 1434 provides that

> said railroad companies shall be liable for any accident to, or injuries sustained by, any person by reason of any act or omission of the railroad companies or by their agents or servants during the...operation of the electrical equipment and apparatus of the railroad trains.

A number of factors lead to the conclusion that Section 1434 does not impose strict liability on defendant. First, by providing for liability of the railroads for any "act or omission" of the railroads, the plain language of the statute speaks not in terms of strict liability, but rather in the language of negligence, thereby invoking traditional concepts of tort law (which presumably includes the venerable "attractive nuisance" allowance for child trespassers). Thus plaintiffs must prove that an "act or omission" has occurred. Second, the sponsors of the

1934 Act expressed no contemporary intention to create a strict liability scheme, but rather viewed the bill as involving "simply the question of a permit." 73 Cong. Rec. 5426 (March 26, 1934) (remarks of Cong. Byrns.)[19] Third, in the half-century that Section 1434 has been on the books, no District of Columbia court has held local railroads strictly liable for electrical injuries to child trespassers; rather common law negligence principles have been applied. See, e.g., Windom v. Penn Central, supra. Finally, the normal factors necessary for application of the doctrine of strict liability are simply not present in this case. See generally W. Prosser, Handbook of the Law of Torts 504-540 (4th ed. 1971).[20] Thus strict liability has not been statutorily imposed on railroads for electrical injuries in the District of Columbia.[21]

B. Preemption

Defendant contends, however, that even common-law duties of reasonable care have been preempted

sub silentio by the federal power to regulate all aspects of railroad safety, even though that power has not been exercised with regard to catenary systems. The 1970 Act, supra p. 1095, gave the Secretary of Transportation and the FRA broad authority to regulate railroad safety on a uniform, national basis. As defendant points out, the Act requires that "laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable." 45 U.S.C. Section 434. Defendant notes Congress's expressed concern that "[t]o subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce." H.R. Rep. No. 91-1194, reprinted in 1970 U.S. Code Cong. & Admin. News at 4104, 4110-11 (hereinafter "Legislative History"). Pursuant to the Act, 226 pages of detailed federal regulations establishing specific safety standards for

numerous specific railroad hazards have been promulgated. 49 C.F.R. Sections 200-236. 838 (1982); see Defendant's Memorandum at 7-13. When the FRA has issued regulations in other areas, it has announced a preemptive intent at that time, see, e.g., 49 C.F.R. Section 225.1 (federal accident reporting requirements are preemptive), and courts have honored such affirmative claims of preemption. See, e.g., Nat'l Assn. of Regulatory Utility Commissioners v. Coleman, 542 F.2d 11, 13-15 (3rd Cir. 1976). It is undisputed, however, that no standard or regulation has been adopted pursuant to the Act to govern railroad catenary systems.

In making the preemption argument, defendant fails to mention that the Act expressly permits the states to "continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State

requirement," unless the state regulation or standard is "incompatible" with federal law or creates an "undue burden" on interstate commerce. Id. (emphasis supplied). When the House Committee approved this savings clause, it stated that a state could continue to have standards governing particular safety hazards "until the Secretary acts with respect to a particular subject matter." Legislative History at 4116.

Defendant does not argue that the FRA has promulgated any regulations on the subject matter of fencing, signing, or other protective mechanisms at railroad rights-of-way with regard to suspended catenary wires; indeed, they argue to the contrary, contending that the absence of federal regulations demonstrates that Conrail has not breached any duty to the plaintiff. Putting aside this latter argument for the moment, the parties are agreed that no federal regulations govern the subject matter at issue here. In similar situations, a number of state courts have held that

state common law doctrines continue to govern in the absence of affirmative federal regulations governing particular areas of railroad safety. See e.g., Henry v. District Court, 645 P.2d 1350, 1352 (Mont.), appeal dism'd sub nom Burlington Northern, Inc. v. Henry, 457 U.S. 1101, 102 S.Ct. 2898, 73 L.Ed.2d 1310 (1982); Rucker v. Norfolk & Western Ry. Co., 77 Ill.2d 434, 33 Ill. Dec. 145, 147, 396 N.E.2d 534, 537 (Ill. 1979); State v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 79 Wash.2d 288, 484 P.2d 1146 (Wash.) (en banc), appeal dism'd 404 U.S. 804, 92 S.Ct. 108, 30 L.Ed.2d 36 (1971). This was also the holding of the recent Ninth Circuit decision in Marshall v. Burlington Northern, No. 81-3161 (April 26, 1983); cf. Pacific Gas & Elec. v. Energy Resources Comm'n. -- U.S. --, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983).

The FRA may well exercise its powers in the areas of fencing or catenary wire safety in the future, but it has not done so. Therefore, although

defendant's alleged compliance with all existing safety standards may be relevant evidence as to an absence of liability at common law, see Rucker, supra, 33 Ill. Dec. at 147-48, 396 N.E.2d at 536-37, the mere existence of an unexercised power to preempt is not in itself preemptive of any local common law remedies that plaintiff may have in this case.

In light of Holland, supra, determination of plaintiff's claim and defendant's duty in this case must be governed by the principles of Restatement (Second) of Torts Section 339 (1965). Because of that section's importance to this case, it will be set out in full:

> Section 339 -- Artificial Conditions Highly Dangerous to Trespassing Children:
>
> A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if
>
> (a) the place where the condition exists

is one upon which the possessor knows or has reason to know that children are likely to trespass, and

(b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and

(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and

(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and

(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

Section 339 is stated in the conjunctive, and the D.C. Court of Appeals in Holland noted that it permits a finding of liability "only when all five elements of the section are satisfied." 431 A.2d at 602 (emphasis supplied).[22] After careful consideration of all the undisputed facts and circumstances of this case, viewed most favorably to plaintiffs, only one possible conclusion could be drawn by a reasonable trier of fact: defendant cannot be held liable under Section 339 as a matter of law.[23] Plaintiffs' case fails to satisfy, at the very least, elements (b), (d) and (e) of Section 339. Detailed explanation follows, after an initial discussion of plaintiffs' evidence under elements (a) and (c).

A. Possessor's Knowledge of Trespassers and Child's Knowledge of Danger.

Plaintiffs have proffered sufficient evidence on elements (a) and (c) of Section 339 to present a disputed issue for a jury on those factors. The dangerous condition at issue here is

the high-voltage catenary wires suspended 18½ feet above defendant's railroad tracks. In the District of Columbia high-voltage electric wires are considered to be inherently dangerous. Brown v. Potomac Electric Power Co., 236 F.Supp. 815, 817 (D.D.C. 1964); cf. Holland, supra, 431 A.2d at 603 (referring to the "silent, deadly danger of high-power electricity"). Defendant knows that its catenary wires are dangerous; it maintains a rule that its own employees must never come within three feet of a catenary wire unless they are certain it has been "de-energized."

If "the place where the condition exists" in Section 339(a) is considered to be the track and surrounding area where plaintiff and his friends rode their bicycles and climbed on railroad cars, then the most favorable inferences drawn from plaintiffs' facts suggest that defendant knew or had reason to know that child trespassers visited the area with some frequency.[24] The plaintiff, his friends, and the fishermen

witnesses all state that they have visited the area next to the Sousa Bridge many times without obstruction. They have often seen other persons there. The fisherman had seen children there, and had even seen them climb onto (but not on top of) trains. Riddick Deposition at 31, 45-47. Various witnesses have stated that there was a worn path leading to the area where the incident occurred. All these facts, taken together with defendant's evidence that from 20 to 28 trains per day pass through this area, could permit a jury to draw the inference that defendant had reason to know about juvenile trespassers there. Conrail personnel on the trains passing by daily may well have observed children in the area and reported it, and a jury could so find even on this bare record.[25]

Defendant argues for a different interpretation of the language of Section 339(a), however. Conrail contends that, in this case, the "place where the condition exists" was located 18½ feet

in the air where the wires were suspended, and that defendant had no reason to know that minors were obtaining access to that place. This argument holds some attraction. Plaintiff has proffered no evidence that would support a finding that Conrail had reason to know that children were "likely" to gain access to the catenary wires by climbing on top of through trains which only occasionally and briefly stopped in that area. Clarence Riddick stated that in 10 years he had never before seen a child climb on top of a train, and the four boys here testified that they had never done so before. Even if evidence of the Windom and Fearing incidents were admissible at trial (and it is not, see pp. 1107-1108, infra), two arguably similar incidents in the previous 11 years cannot reasonable support a finding that such access is "likely," as Section 339(a) requires.

The Court need not decide which interpretation of the language of Section 339(a) is correct,

in light of the dispositive effect that other subsections discussed below have on these facts. The likelihood of minors coming into contact with defendant's suspended wires involves some consideration of foreseeability, an inquiry which merges to some extent with the inquiry as to realization of whether the condition "will involve an unreasonable risk" under subsection (b) of Section 339, discussed below.

As for subsection (c), plaintiffs' evidence would show that Eldee Edwards, Jr., did not "realize the risk" of coming close to the catenary wire. Plaintiff stated in deposition that he did not realize that the wires were dangerous. This alone creates a triable issue, and it would be for the jury to evaluate the testimony. The Court must take plaintiff's statement as a fact at this summary judgment stage.[26] See also Prosser, supra, at 374 (high school-age boys "may reasonably be expected not to appreciate" dangers of high-voltage wires).

B. The Risk, the Balance of Burdens, and Reasonable Care.

Althouth there are triable disputes with regard to Section 339(a) & (c), these disputes are not "material" issues if any one of the other elements of Section 339 is not satisfied. And the undisputed facts leave no room for rational doubt that plaintiffs' case fails to satisfy the remaining elements. These elements are interrelated to some extent, and build on much of the same evidence. They will be treated seriatim here, however, in an attempt to present plaintiffs' best case in the clearest manner possible.

1. Section 339(b)

The second subsection of Section 339 embodies an element of reasonable foreseeability: the dangerous condition must also be one "which [the possessor] realizes or should realize will involve an unreasonable risk of death or serious bolidy harm to" children. The comments to Section 339 make it clear that the dangerous condition

must be realized to be "one with which [children] are likely to meddle." Section 339, comment (e) at 200 (emphasis supplied).

Plaintiffs concede that the wire that injured plaintiff was suspended 18½ feet in the air and was "ordinarily inaccessible." Plaintiffs' Pretrial Brief at 194-95. In Brown v. Potomac Electric Power Co., supra, then-District Judge Spottswood Robinson stated the general rule that there is no "duty to insulate...properly suspended overhead wires so located that no one could reasonably be expected to come into contact with them." 236 F. Supp. at 819. The area where plaintiff was injured was not a side track or storage yard where trains normally stand for long periods of time; the uncontroverted evidence is that the tracks there are through tracks with at least 20 trains per day passing over them. Plaintiff made no contention and proffered no evidence that trees or other tall structures were close enough to the wires to permit access by

climbing or the catenary poles themselves have steps or rungs. Photographs of the site show that there were no such means of access close to the wires. See Defendant's Memorandum, Ex. B, C, & D (photographs of the area). It is undisputed that standing trains are the only means of access to the wires available to children at the site.

Further, it is also uncontroverted that through trains were stopped at the site only occasionally and briefly, awaiting signals; the most favorable evidence to plaintiffs is that the train on which plaintiff was injured was stopped for twenty minutes.[27] As the D.C. Court of Appeals stated in Holland, supra, "'the possessor [of railroad tracks] is free to rely upon the assumption that any child of sufficient age to be allowed at large by his parents, and so to be at all likely to trespass, will appreciate the danger [of moving trains] and avoid it.'"

431 A.2d at 603 (quoting Prosser, supra, at 371) (emphasis supplied). Defendant was therefore entitled to assume as a matter of D.C. law that, if any children were in the area where plaintiff was injured, they would not climb onto the moving through trains there.

The usual absence of stationary means of access and the normal presence only of moving through trains are thus undisputed. These facts preclude a reasonable trier of facts from finding that catenary wires suspended 18½ feet in the air posed a danger that Conrail "realiz[d] or should [have] realize[d] will involve an unreasonable risk" to children under Section 339(b). The risk was not "unreasonable" but, rather, was unlikely, and no facts in the record suggest that defendants should have "realized" otherwise.

Plaintiffs attempt to fill this void in their case by proffering evidence of other prior catenary injuries to children in the District of Columbia, including live or videotaped testimony

by surviving victims. Although plaintiffs have made no effort to explain the specific purpose for which they would seek to admit this evidence, it could only be for two interrelated purposes, both under Section 339(b): to show the "unreasonable risk" posed by the wires and to show that defendant "ha[d] reason to know" that the wires posed such a risk.[28]

Evidence of prior accidents is generally admissible in the District of Columbia "to show defendant's notice or knowledge of the...dangerous condition [that] caused the accident." Hecht Co. v. Jacobsen, 180 F.2d 13, 17 (D.C. Cir 1950); accord, Capital Traction Co. v. Copland, 47 App. D.C. 152, 156-58 (D.C. App. 1917). Such evidence is also admissible to show the dangerous nature of the specific condition at issue. District of Columbia v. Armes, 107 U.S. 519, 524-25, 2 S.Ct. 840, 844-46, 27 L.Ed. 618 (1883); Myers v. Capital Transit Co., 126 F.2d 231 (D.C. Cir 1942). (Although defendant does not dispute that catenary

wires are dangerous in themselves, it does dispute whether they posed an unreasonable danger in this case, 18½ feet in the air).

However, as Professor Wigmore has recognized, basic considerations of relevancy "require[] that other instances of injuries received should have occurred under substantially similar circumstances." 2 Wigmore, Evidence Section 458, at 573 (Chadbourn rev. 1979) (emphasis in original). "The requirement of similarity of conditions is probably at its strictest" when evidence is sought to be admitted to show the dangerousness of a particular condition or situation, although it is then "much relaxed" when the evidence is proffered to show notice. McCormick, supra note 28, Section 200 at 475.

The requirement of substantially similar circumstances as a precedent to admission of prior accidents is adhered to in the District of Columbia. See e.g., Hecht Co. v. Jacobsen, supra,

180 F.2d at 17 ("similar circumstances")p Hackett v. District of Columbia 264 A.2d 298, 300 (D.C. App. 1970) (excluding evidence of prior accident because "there was no proof that...the same condition[s] existed at the time of both accidents"); Dunn v. Evening Star Newspaper Co., 232 A.2d 293, 297 n. 8 (D.C. App. 1967) ("unity of circumstances" is "required" for admission). Temporal, as well as physical, conditions must be substantially similar before evidence of prior accidents will be admitted. See Hampton v. Kroger Co., 618 F.2d 298, 499 (8th Cir. 1980) (per curiam) (prior accidents should be "similar in time, place [and] circumstances to be probative"); Sears, Roebuck & Co. v. Copeland, 110 F.2d 947, 949 (4th Cir. 1940) (prior accidents must have occurred "under substantially the same conditions, at substantially the same place..., and at a time not too remote"); see generally Annot., 70 A.L.R.2d 167, 208 (1960). Thus evidence of accidents that were remote in time to the one

under examination may be excluded. See, e.g., Small v. Pennsylvania R. Co., 80 F.2d 704 (D.C. Cir. 1935) (evidence of accident at same railroad crossing 11 years earlier excluded); Stewart v. State, 92 Wash.2d 285, 597 P.2d 101, 112 (Wash. 1979) (en banc) (excluding evidence of similar automobile accident three years earlier because roadway surface had been changed in the interim).

The rationale for excluding evidence of prior accidents that happened under dissimilar or remote circumstances is a matter of logic: as time and circumstances become less similar to the accident under consideration, the probative value of the occurrence of such prior accidents decreases, while the prejudicial value of such evidence before a jury remains high. The value of such evidence is that, when prior accidents have occurred under similar circumstances, the accidents and knowledge of them "operate[] as a standard against which can be tested the

reasonableness of the defendant's conduct." Julander v. Fort Motor Co., 488 F.2d 839, 846 (10th Cir. 1973)). But "such evidence should be carefully examined before being received to the end that the circumstances of the 'other accident' bear similarity to the circumstances surrounding the accident" at issue. Id. at 846-47. This is because such evidence can be unfairly prejudicial; "the jury might infer from evidence of the prior accident alone that ultra-hazardous conditions existed at the site and were the cause of the later accident without those issues ever having been proved." Gardner v. Southern Railway Systems, 675 F.2d 949, 952 (7th Cir. 1982) (per curiam); accord, Robitaille v. Netoco Community Theatres, 305 Mass. 265, 25 N.E.2d 749 (Mass. 1940).

Finally, "[t]he question whether evidence is too remote is in all cases to be determined by the court," not the jury. United States v. Maryland and Virginia Milk Producers Ass'n.,

20 F.R.D. 441, 442 (D.D.C. 1957) (Holtzoff, J.). The Federal Rules of Evidence give to the Court the power and discretion to rule on the evidence and exclude irrelevant, unfair, confusing or misleading evidence. See Fed. R. Evid. 401-403. Thus "[e]ven when substantial identity of the circumstances is proven, the admissibility of such evidence lies within the discretion of the trial judge who must weigh the dangers of unfairness, confusion, and undue expenditure of time." McKinnon v. Skil Corp., 638 F.2d 270, 277 (1st Cir. 1981).

Given these general guidelines, it is clear that the only two prior accidents that are even arguably admissible are the Fearing accident of 1973 and the Windom accident of 1968. The other prior incidents occurred at locations and under circumstances far from and totally dissimilar to the site at which plaintiff was injured.[29] For example, the Throop incident in 1978 and the Morris/Zilko accident in 1971 occurred on

top of railroad cars that were stored for long periods of time in open yards that lacked any barriers to access and were immediately adjacent to a commercial parking lot and 1½ blocks from the District of Columbia Air and Space Museum which thousands of children visit each year. The Sligh and Souder accidents in 1978 occurred in an unfenced railroad storage yard upon railroad cars parked only fifty feet from a high-density housing development. Daniel Morgan and Theodore Hansen were riding moving trains when, in 1977 and 1978 respectively, they were injured by catenary wires. Edwin Reigle was injured by catenary wires in 1962 when he jumped off of the Sousa Bridge onto a passing railroad car, an incident totally dissimilar from plaintiff's.

The site at which plaintiff's accident occurred is a discrete one, bounded on two sides by a river, another by a tunnel and the Southeast Freeway, and partially on the fourth side by the fenced Congressional cemetery. The only point

of access about which plaintiffs have proffered evidence is the road that runs one-half mile from RFK Stadium to the railroad track area. Furthermore, the railroad tracks there are through tracks that commonly do not have standing trains on them. All these factors go to access to the site and to the wires, and ease of access is a very relevant consideration with regard to defendant's notice and alleged realization of the danger at that site. Thus any notice that defendant may have had regarding children who had previously climbed on top of trains standing in storage yards at other areas in the District of Columbia located near houses or museums with no fences or other natural bars to access to the tracks is not relevant to defendant's knowledge or realization of the likelihood that children would be injured by a catenary wire at the site of plaintiff's accident. On grounds of relevancy, therefore, evidence of these prior accidents would not be admissible at trial under

Section 339.[30] The facts of these accidents are consequently not material for purposes of summary judgment.

Evidence of the Fearing and Windom accidents would be barred at trial as well, although they occurred on standing cars near the discrete site where plaintiff was injured. Plaintiffs' proposed manner of introduction, live testimony, would clearly be prejudicial; at least one of the young men lost a limb as a result of the catenary accident. A sanitized written stipulation would be inadmissible as well, however, for the simple reason that these two accidents are irrelevant to the issue of defendant's knowledge in 1979 due to their remoteness in time and a major change in the circumstances relating to access to the site. Both of these boys were injured prior to the construction of the Southwest Freeway in 1974. That highway now separates the site from the nearby housing area with many lanes of high-speed traffic. Jeffrey Windom came to

the site directly from those houses; in fact, he was attracted to the site by the ongoing construction and piles of dirt which he went to play on.[31] Windom Deposition at 15, 27-28; Windom, supra, transcript at 411. Neither party has produced any evidence as to how William Fearing gained access to the site. But two facts are clear: access to that site was made much more difficult after 1974 by construction of the Southwest Freeway, and no catenary accidents occurred at that site after the freeway was constructed until plaintiff was injured. See supra, note 15. Thus, once the freeway was constructed, the conditions were substantially different from those that prevailed when the prior accidents occurred. Compare Stewart v. State, 92 Wash.2d 285, 597 P.2d 101, 112 (Wash. 1979) (barring evidence of similar automobile accident 3 years earlier because the roadway surface had been changed in the interim). For that reason, and taking into account the inherent prejudicial effect

of evidence of any prior accidents (see supra pp. 1106-1107), the pre-1974 accidents would be inadmissible at trial on the issues of defendant's knowledge or realization of the risk in 1979.

Even if the Fearing and Windom incidents were admissible for the limited purpose of showing that two prior catenary incidents had occurred at the site in the 11 years before plaintiff's accident, a jury could rationally find that only two incidents in 11 years, both occurring before construction of the Southwest Freeway, put defendant on notice that after the freeway was constructed, its catenary wires at that point constituted an unreasonable risk of harm to minors. A catenary incident had not occurred at or near the site where plaintiff was injured for six years (1973-79), and none had ever occurred after the freeway blocked easy access to the site from the housing nearby. Subsection (b) of Section 339 must be read to involve some requirement of reasonable foreseeability or probability;

a theoretically possible risk cannot be "unreasonable" without consideration of the probability of its recurrence. Cf. City of Los Angeles v. Lyons, -- U.S. --, -- n. 8, 103 S.Ct. 1660, 1668 n. 8, 75 L.Ed.2d 675 (1983) (the "reasonableness" of a plaintiff's alleged fear of involvement with police "is dependent upon the likelihood of a recurrence of the allegedly unlawful conduct"). Absent any similar injuries at the site since the freeway was built, defendant cannot be charged with "realization" that the catenary wires posed an "unreasonable risk." On the undisputed facts thus considered, defendant had no reason to know that its catenary wires posed an unreasonable risk in 1979 and judgment for defendant is appropriate as a matter of law under Restatement Section 339(b). See W. Schwartzer, Managing Antitrust and Other Complex Litigation 41-42 (1982).

Finally on this point, there are many venerable precedents finding as a matter of law

that, under the "attractive nuisance" doctrine, injuries to child trespassers from electrical wires suspended high above the ground cannot normally provide a basis for tort liability. See, e.g., New York, New Haven & Hartford R. Co. v. Fruchter, 260 U.S. 141, 43 S.Ct. 38, 67 L.Ed. 143 (1922); Rasmussen v. Palmer, 134 F.2d 780 (2d Cir. 1943) (Chase, J.); Brown v. Potomac Electric Power Co., supra; Dugan v. Pennsylvania Railroad Co., 387 Pa. 25, 127 A.2d 343 (Pa. 1956), cert. den., 353 U.S. 946, 77 S.Ct. 825, 1 L.Ed.2d 856 (1957); Musser v. Norfold & W. Ry. Co., 122 W.V. 365, 9 S.E.2d 524 (W.V. 1940); Salt River Valley Water Users' Ass'n v. Compton, 39 Ariz. 491, 8 P.2d 249, aff'd on rehearing, 40 Ariz. 491, 11 P.2d 839 (Ariz. 1932); McDonald v. Shreveport Rys. Co., 174 La. 1023, 142 So. 252 (La. 1932); Burns v. City of Chicago, 338 Ill. 89, 169 N.E. 811 (Ill 1929) (per curiam); Reddy v. City of Watertown, 53 S.D. 347, 220 N.W. 851 (S.D. 1928); Mobley v. City of Monroe, 37 Ga.

App. 364, 140 S.E. 516 (Ga. 1927). Plaintiff has not cited a single case holding to the contrary and the Court has discovered only one, which is clearly distinguishable both on the law and its facts.[32] Given plaintiff's facts in this case, Justice Cardozo's discussion, speaking for the New York Court of Appeals in 1919 in a similar case, is still appropriate today:

> There was, of course, a duty to adopt all reasonable precautions to minimize the resulting perils. We think there is no evidence that this duty was ignored. The trolley wire was so placed that no one [normally] could reach it. Only some extraordinary casualty, not fairly within the area of ordinary prevision, could make it a thing of danger. Reasonable care in the use of a destructive agency imports a high degree of vigilance. But no vigilance, however alert, unless fortified by the gift of prophecy, could have predicted the point

> upon the route where such an accident would occur. It might with equal reason have been expected anywhere else.

Adams v. Bullock, 227 N.Y. 208, 125 N.E. 93, 93 (N.Y. App. 1919) (citations omitted).

2. Section 339(d)

Subsection (d) of Section 339 requires that, for liability to attach in a child trespasser case, both the "utility" of the dangerous condition and the "burden of eliminating the danger" must be "slight" when compared to the "risk to children involved." The utility of the catenary wires to defendant is clear and considerable; the wires are necessary to provide power to enable defendant to run its interstate trains. The physical and financial burden on defendant of "eliminating" the wires and changing completely to another system of power obviously would be prohibitive, and plaintiffs have not even suggested such a wholesale change.[33] As to the risk involved, the analysis of the evidence under Section 339(b) made

above, supra pp. 1104-1109, indicates the risk of harm posed by the catenary system to child trespassers at the site where plaintiff was injured is "slight" by any standard.[34] The very low risk that accidents such as this one will occur is evidenced by the uncontroverted testimony of defendant's Assistant Vice-President that, generally, "catenary accidents comprise approximately 0.01% of all [railroad] accidents." Defendant's Memorandum in Support at 30 n. 25; Gregory Deposition at 79-84.

Even if the risk of harm in this case is not considered to be prohibitively low, the analysis under subsection (d) requires a balancing of the burden to defendant of taking steps to eliminate accidents such as plaintiff suffered, against the risk of such accidents actually occurring.[35]

Plaintiffs' only proffered evidence under Section 339(d) is a factually unsupported statement that defendant could have "purchased" enough warning signs to post one on each side of

of the track every 25 feet along its 17.7 miles of electrified track in Washington, D.C., at a cost of $30,000. Pretrial Brief at 195. The cost of installing and maintaining such signs is not estimated by plaintiffs; no witness or other factual basis is proffered as support for the estimate. It is again clear that plaintiffs have generally failed to meet the minimal requirements of Rule 56(e), see supra, pp. 1091-1092, by their failure to support this alleged cost estimate either in their opposition to the summary judgment or in their pretrial brief. One incomplete and unsupported estimate (which is the only specific cost estimate of any kind proffered by plaintiffs) is totally insufficent to put at issue a material fact for trial.

Even assuming that plaintiffs' signing cost estimate included the cost of installation and maintenance and were competent under Rule 56(e), it simply does not create a jury issue under Section 339(d). The facts are undisputed that

there was already a "No Unauthorized Vehicles" sign posted along the road that plaintiff travelled to the site, and there were "No Trespassing" warnings stencilled on the catenary poles at the site. The undisputed evidence supplied by plaintiff and plaintiffs' proffered expert witnesses, however, is that signs by themselves do not deter children in general, and did not deter children in general, and did not deter this plaintiff in particular, from proceeding past them. Plaintiffs themselves adduced expert testimony as to the general point, see Fraad Deposition at 13-14; Rosenfeld Deposition at 17-18. As Judge Richey held in directing a verdict for Penn Central Railroad in the factually similar case of Windom v. Penn Central, supra: "As a practical matter, it is not possible for the railroad to prevent a child from approaching the railroad tracks and climbing on cars, if the child is determined to do so." Windom Transcript at 261 (Attachment to Defendant's Memorandum).

As to this particular case, plaintiff's companion Tyrone Brown saw the "No Unauthorized Vehicles" sign but paid it no attention and did not even call it to his companions' attention. "No trespassing" signs already were posted at this site; they did not stop the plaintiff.[36] The undisputed material evidence therefore establishes that signs alone would not "eliminat[e] the danger" within the meaning of subsection (d) (emphasis supplied), and plaintiffs' proffer as to the burden of putting up such signs is therefore irrelevant as well as insufficient.

Moreover, the burden on this defendant to protect against a particular danger must be considered on a system-wide level, and not just with regard to a particular location or a particular city or state. Given that the site of plaintiff's accident was not a storage yard or side track, there was no way for defendant to pinpoint it as a site more "likely" to have such an accident occur than many other urban rights-of-way.

Therefore, as the Pennsylvania Supreme Court has noted,

> It is, of course, obvious that if there were imposed upon the defendant the requirement of fencing the place where this accident occurred, it would likewise be subject to the duty of fencing the innumerable places along its many miles of tracks frequented by trespassing children.

Dugan v. Pennsylvania RR, 387 Pa. 25, 127 A.2d 343, 348 (Pa. 1956), cert. den. 353 U.S. 946, 77 S.Ct. 825, 1 L.Ed2d 856 (1957). The cost of such protective measures is arguably prohibitive, and at the very least not "slight" as a matter of law under Section 339(d). For example, defendant proffers without dispute from plaintiffs that it would cost over $2.5 billion to fence Conrail's 33,529 miles of track. Memorandum in Support at 30 n. 23. Plaintiffs' $30,000 cost estimate for signs is restricted to the District of Columbia tracks alone, and is on

this ground as well deficient under Section 339(d). Moreover, even fencing, like signing, is not "child-proof," see Nolley v. Chicago M. St. P. & P. Railroad Co., 183 F.2d 566, 569 (8th Cir. 1950) cert. den., 340 U.S. 913, 71 S.Ct. 284, 95 L.Ed. 660 (1951); in fact, fencing can create other problems or dangers of its own. See Hasselman Deposition at 98-103.

The opinion of the Pennsylvania Supreme Court in the Dugan case, supra, is most persuasive on this point. The Dugan court held as a matter of law under Restatement Section 339(d) that to extend liability to a railroad for catenary injuries to child trespassers along urban rights-of-way "would inordinately burden the operation of the railroad" and "would impose upon railroads a heavier burden than they can justly be expected to bear." 127 A.2d at 349. The court therefore reversed a jury verdict that had been returned for the plaintiff in a case factually similar to the instant one.[37] Dugan's rationale has had

considerable impact on the legal analysis of child trespasser tort cases. The authors of the Restatement (Second) of Torts relied upon Dugan when they revised the language of Section 339(d) to include consideration of "the social utility" of activities that may pose some danger to child trespassers. See Section 339, Appendix at 131 (Reporter's Notes, #4). Likewise the en banc D.C. Court of Appeals cited Dugan in Holland, supra, to support its statement that "in the absence of statutory requirements railroads are generally under no duty to erect fences or maintain other safeguards." 431 A.2d at 603 n. 11. That statement, although dictum, was concurred in by the three dissenters with regard to "many if not most locations." Id. at 604 (Ferren, A.J., dissenting).

Defendant must select priorities for protecting against accidents, and cannot protect against them all without an unbearable burden to itself, and thereby to a rail system which is a

vital public necessity. As noted above, p. 1095, the Federal Railroad Administration has not imposed an obligation on railroads to fence their urban rights-of-way, noting the high cost that such a requirement would involve. The Secretary's stance and the adoption of Dugan by the authors of the Restatement and of the Holland decision, taken together with all the other factors discussed above under Section 339(d), establish as a matter of law that neither the utility of the catenary system nor the burden of eliminating its dangers is "slight" when compared to the risk of an injury such as was regrettably incurred by this plaintiff. On the undisputed material facts in this record, no rational dispute is presented for a jury as to this conclusion.

3. Section 339(e)

Even if all the other conditions of Section 339 were satisfied by plaintiffs' case, "there is liability only if the possesser fails to take the steps which a reasonable man would take under

such circumstances. If the possessor has exercised all reasonable care..., and still has not succeeded, there is no liability." Restatement (Second) of Torts Section 339, comment (o). Professor Prosser has commented in this regard that "[s]uch things as standing freight cars... are undeniably attractive to children, but are socially useful and very difficult to safeguard, and so may call for very little in the way of care." Prosser, supra, at 375.

As noted above, supra p. 1098, the D.C. Court of Appeals stated as an alternate ground for its holding in Holland that "in the absence of statutory requirements railroads are generally under no duty to erect fences or maintain other safeguards," and that the allegations of a nine-year-old child trespasser injured on defendant's railroad tracks did "not satisfy the requirements of the Restatement rule [Section 339]." 431 A.2d at 603 n. 11. It is uncontested that Conrail was in compliance with all applicable statutes

and safety regulations with regard to its Washington D.C., tracks on the date of plaintiff's accident, and that there was no statutory requirement that it fence the tracks or post signs where plaintiff was injured. Thus the dictum in Holland indicates that as a matter of District of Columbia law, defendant exercised reasonable care under Section 339 with regard to the location at issue here.

Moreover, the considered decision of Congress and the FRA not to require fencing or signs at urban rights-of-way is further persuasive and uncontested evidence that defendant was exercising reasonable care at the site at issue. As Justice Holmes noted long ago, "what is usually done may be evidence of what ought to be done." Texas & P.Ry. Co. v. Behymer, 189 U.S. 468, 470, 23 S.Ct. 622, 623, 47 L.Ed. 905 (1903). At the point where plaintiff was injured the wires could not be de-energized, if the 20-28 through trains that pass by each day were to have

power to operate. Defendant was in compliance with all statutes and regulations at that point, and had no reason to suspect that that particular location was any more likely to have a catenary accident occur than any other used by through trains along its lines. Finally, at different sites on the Conrail line where trains stand for long periods or where the catenary wires are not beyond normal reach (such as at bridges or where cables may go underground), thereby making injurious contact more likely forseeable, it is undisputed that defendant has a policy of either fencing the surrounding area or of de-energizing the wires. Plaintiffs' Pretrial Brief at 16, 19-20, 67, 69 (summarizing testimony of witnesses Schertzer, Ginter and Hasselman); see also Defendant's 9(h) Statement, 14. It is therefore, in effect, conceded that defendant has taken reasonable precautions to protect against the risk of harm from catenary wires where it is reasonably foreseeable that such harm might occur. In light

of all these uncontested facts, defendant did as a matter of law exercise all reasonable care with regard to the site of plaintiff's accident, and no rational jury could find to the contrary.

Plaintiffs have totally ignored defendant's comprehensive proffers of evidence and arguments directed at subsection (e) of Section 339, as they have on other points. They assert, without citing specific facts and without further argument, that the issues "are properly for resolution by the trier of fact, the jury." Plaintiffs' Opposition (May 11, 1983) at 5. In many cases, it is true that reasonableness is an issue of fact. However, when all the material facts are undisputed and before the Court on summary judgment, reasonableness may be "a question of law where only one inference is possible from the evidence." Quinto v. Legal Times of Washington, 506 F. Supp. 554, 564 (D.D.C. 1981) (Flannery, J.); accord, Zweig v. Hearst Corp., 521 F.2d 1129, 1134-36 (9th Cir.), cert. den., 423 U.S. 1025,

96 S.Ct. 469, 46 L.Ed.2d 399 (1975); W. Schwartzer, Managing Antitrust and other Complex Litigation 42 (1982). See also Halperin v. Kissinger, 606 F.2d 1192, 1209 (D.C. Cir. 1979) (subjective good faith may be determined on summary judgment), aff'd in part, cert. dismissed in part, 452 U.S. 713, 101 S.Ct. 3132, 69 L.Ed.2d 367 (1981) (per curiam); Flying Diamond Corp. v. Pennaluna & Co., Inc., supra, 586 F.2d 707, 713 (absence of negligence may be determined on summary judgment).

A case in point is Bloomgarden v. Coyer, supra, 479 F.2d 201 (D.C. Cir. 1973). In Bloomgarden, our Court of Appeals approved a grant of summary judgment based on determination of the plaintiff's state of mind or intent, which is normally a factual issue. Upon review of the undisputed material facts, the Court held that "[t]here simply was no basis on which a jury could rationally find" other than what the district court had determined, and summary judgment was therefore appropriate to avoid a "useless

trial." Id. at 206, 212. This case is similar, although of course not identical. Defendant has produced a wealth of evidence, and plaintiffs have responded with little more than bare assertions; unlike the plaintiffs in Neumann v. Vidal, 710 F.2d 856, No. 82-1685 (D.C. Cir. June 21, 1983), no affidavits have been submitted to factually traverse defendant's motion. No disputes as to material issues are supported by plaintiffs' submissions or by the record that the Court has reviewed. Careful consideration of the relevant legal standards, based on the undisputed material facts, leads to the unavoidable conclusion that no rational jury could return a verdict for plaintiffs under the law of the District of Columbia, that is, Restatement (Second) of Torts Section 339. Judgment for defendant is therefore appropriate.

In granting this summary judgment for defendant, the Court is respectful of Judge Gasch's statement that "the summary judgment stage is an

inappropriate juncture for the determination of issues such as" these. Alston v. Baltimore and Ohio Railroad Co., supra, 433 F. Supp. at 557 (granting directed verdict for defendant in child-trespasser case). But a number of factors make summary judgment the preferred and clear course in this case. First, the local law to be applied in a case like this is now established, unlike the state of the law in the District of Columbia prior to Holland when Alston was decided. The Court has given great weight and deference to the en banc decision of the D.C. Court of Appeals in Holland, supra. The concurrences of the majority and the dissent there make it clear, inter alia, that courts governed by District of Columbia law may decide cases under Section 339 as a matter of law; Holland itself affirmed a grant of summary judgment in favor of the railroad under Section 339 and the dissent recognized the propriety of summary judgment in case-by-case applications of Section 339. Other courts have

granted judgments as a matter of law in similar cases. See cases cited supra p. 1105.

Most significantly in this case, the plaintiffs have conducted massive discovery in an attempt to develop favorable evidence for trial. Defendant has responded to hundreds of interrogatories and requests for admission, permitted plaintiffs' attorneys to search through literally acres of company records, and produced scores of persons for depositions. Discovery lasted over six months and plaintiffs have filed a 225-page pre-trial brief. As discussed in detail above, the few actual facts stated therein do not set up material disputes to the undisputed evidence proffered by defendant. Plaintiffs cannot be permitted to avoid summary judgment after such lengthy and intensive discovery and pretrial briefing "on the mere promise that a more substantial showing will be made" at trial. Merit Motors, Inc. v. Chrysler Corp. 569 F.2d 666, 673 (D.C. Cir. 1977); see First National

Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288-90, 88 S.Ct. 1575, 1592-93, 20 L.Ed.2d 569 (1968). Judge Gasch has elsewhere noted that if plaintiffs fail to place in the record particular facts that might be more favorable to them, then they "must assume the risk of whether [defendant's] facts are sufficient to support" summary judgment. Business Equipment Center Ltd. v. DeJurAmsco, 465 F. Supp. 775, 783 (D.D.C. 1978).

In addition, in this case the parties received a detailed seven-page Pretrial Order that made it clear that the pretrial briefs should fully "show the hand of each party" and that a party who "held back" evidence did so at his peril. The Pretrial Order provided that:

> Any fact, legal contention, claim for relief, ...or affirmative matter not set forth in detail [in the pretrial briefs] shall be deemed abandoned, uncontroverted, or withdrawn (as may be appropriate) in future

> proceedings,...except for matters of which a party could not have been aware in the exercise of reasonable diligence at the time the pretrial brief was filed. Such a showing as to new matter shall be made by motion.

Pretrial Order 11 (filed Sept. 22, 1982). Plaintiffs have made no motion to introduce new factual matter at trial and the Court must presume that they have none. The purpose of pretrial briefing is to fully expose the proffered facts of each party to the knowledge and opposition of the others, thereby avoiding surprise, permitting irrelevant issues to be disposed of, and streamlining the time and expense of trial if necessary. Plaintiffs are therefore bound to their pretrial brief, and would be barred from producing other evidence at trial which was not proffered in that document or otherwise readily apparent from the record.

The Court has reviewed the extensive record

in this case with a more favorable eye toward plaintiffs' case than their pleadings would warrant. As a matter of law, defendant cannot be held liable in this case under a number of factors under Section 339, and the failure to fulfill any one of those factors requires summary judgment. While summary judgment normally should be granted only reluctantly, it is warranted in exceptional cases where only one result or inference is possible under any view of the undisputed evidence. See Quinto v. Legal Times of Washington, supra, 506 F. Supp. at 564. The Court feels sympathy for the minor plaintiff's injuries, but as a matter of law he cannot recover on this record.

For all the reasons discussed above, an accompanying Order therefore grants defendant's motion and orders that the action be dismissed.

FOOTNOTES

[1]Restatement (Second) of Torts Section 339 is reprinted in full infra at pp. 1101-1102.

[2]Plaintiffs' 225-page pretrial brief lists 82 witnesses and over 580 separately numbered purported factual statements. Only one of the factual statements, the first, relates specifically to the incident at issue in this case. It reads in its entirety: "Eldee Edwards, Jr., was burned from electricity from the catenary system in Washington, D.C.[,] operated and/or maintained by the defendant on July 7, 1979, near the Sousa Bridge." Id at 49. This fact is not contested by defendant; neither would it establish defendant's liability if proved at trial. Plaintiffs have also provided a brief two-page narrative account of the incident in a different section of their pretrial brief under the inexplicable heading "Legal Contention No. 5." Id at 183-84. This two-page presentation of facts in a 225-page pretrial brief also fails to state specific facts relating to this minor plaintiff's accident that would establish defendant's liability in this case under the governing D.C. law. In contrast, plaintiffs have devoted 68 separately numbered statements of fact to an account of an accident that occurred to a minor a year earlier, under different circumstances, and over two miles away from where plaintiff was injured. Id. at 53-61. The facts of this accident are irrelevant to this case and would be inadmissible at trial. see pp. 1106-1107, infra, and the paucity of relevant facts in the Pretrial Brief reflects the unbalanced use of resources that plagued counsel and the Court during the discovery period in this action.

[3]Plaintiff was approximately 11 years and 9 months old on the date of the incident, and had completed the 6th grade with a B or C average. His companions on July 7, 1979, were Wayne Childress (12 years, nine months old). Tyrone Brown (11 years, 11 months old), and Andre Stukes (12 years, 10 months old). Most of the evidence favorable to plaintiffs is found in the depositions of these four boys. Because the claims of the minor plaintiff's father for medical expenditures on behalf of his son depend entirely on whether the son can recover, the minor will be referred to as the "plaintiff" hereafter.

[4]Plaintiff's friend Tyrone Brown refused to ride closer to the train, because "something told me to stay up there [on the road]" and "maybe the police would see us getting on the train... and try to lock them up." Brown Deposition at 14-15. Brown proceeded to ride his bicycle under the bridge and did not see the injury to plaintiff occur. Id. at 28-29.

[5]Plaintiffs have never proffered evidence as to how long, specifically, the train was stopped. Defendant's records indicate that the train was stopped for seven minutes before the accident; a fisherman witness, Charles Riddick, who was deposed by defendant, said that the train was stopped "for 20 minutes or better" and that was the longest period of time he had seen a train stop there in 10 years. Riddick Deposition at 5, 31, 36.

[6]Plaintiff may have climbed more than one car. See Stukes Deposition at 36 (three cars); Childress Deposition at 16-19 (two cars); Brown Deposition at 21 (two cars); Edwards, Jr. Deposition at 42 (one car and maybe jumped to another).

[7]Defendant evidently has a statement signed by Stukes after the accident on December 1, 1979, in which Stukes stated that "There were wires hung above the car that the passenter trains use for power. I was afraid he [palintiff] could get hurt by the wires." Stukes Deposition at 37. This statement apparently was prepared by a railroad official in Stukes' home without counsel present. Stukes appears to have recanted this statement in his deposition for the instant litigation, see id. at 37-41, 57-59, and the Court has disregarded the statement for purposes of this motion.

[8]Plaintiff has stated that he "grabbed" the wire for no particular reason, although he was "a little dizzy." Edwards Jr. Deposition at 52. Brown stated that he had been told by Childress that plaintiff "looked like he was going to fall or something and he caught onto one of [the wires]." Brown Deposition at 29. Chidress stated that he did not actually see how plaintiff came into contact with the electricity. Childress Deposition at 24. At a discovery conference, plaintiffs' counsel indicated to that Court that his expert medical testimony would suggest that plaintiff did not actually come into contact with the wire, but that he came close and the electric current "arced" into his body.

[9]Clarence Riddick, the fisherman who witnessed the accident stated an account of the incident in deposition that differed in some respects from the version in the text, which has been developed in large part from the depositions of the four boys. Riddick stated that the train had been stopped for about 20 minutes, and that the boys had been climbing on, in, and through the cars for about 15 minutes, although none of the boys climbed on top of a car until plaintiff did

and was injured. Riddick and his fishing companion Laura Watkins both stated that they yelled at the boys two or three times to "get off the train," and that they specifically yelled at plaintiff to get off the car on which he was injured. Although they believed that the boys heard them because the boys looked at them when they yelled, the boys did not heed the warnings or say anything in response. The boys stated in deposition that they did not hear anyone yell at them or tell them to get off the train before plaintiff was injured.

[10]Defendant proffers that its witnesses would testify otherwise at trial. Defendant's former Special Police Officer McCabe stated in deposition that he patrolled this area as part of his regular duties, that he did not recall ever finding trespassing children within one-half mile of the spot where plaintiff was injured, and that he considered it to be "one of the most isolated" areas he "had on the railroad." McCabe Deposition at 80, 83. Other of defendant's officials testified similarly that the area where plaintiff was injured was not known for having child trespassers. See Beyer Deposition at 128, 132; Mitchell Deposition at 59-60; Memorandum in Support of Defendant's Motion for Summary Judgment (April 25, 1983) at 21-22 (hereinafter "Defendant's Memorandum"). This evidence would be for the jury, and must be disregarded at this state.

[11]Plaintiffs claim that such stoppages are "common," Pretrial Brief at 184, but state no factual basis for that conclusion. Defendant proffers evidence that such stops at the point in question were uncommon. See Defendant's Memorandum at 23. Riddick's deposition testimony, see note 9, supra, as well as the boys testimony that they had never before seen a train stopped

there, and the uncontradicted representation that these were "through tracks" are all evidence supporting defendant's proffer. There are no facts in the record to the contrary.

[12]A photograph of the site attached to defendant's 9(h) statement (Exhibit D) indicates that the poles from which the catenary wires are suspended have no rungs on them for climbing; furthermore, no trees or other high, climbable objects are near the wires. Plaintiffs make no claim that there were such rungs or other means of access.

[13]In March 1972, the National Transportation Safety Board also recommended that the FRA require fences and "more and better signs," and "promulgate regulations to cover the operation of catenary...power supply systems." Railroad Accident Report No. NTSB-RAR-72-3 at ii, 20 (March 29, 1972) (partial copy attached to Defendant's Memorandum). Neither the FRA nor Congress has ever acted on this recommendation.

[14]The facts the plaintiff proffer in this regard are undisputed for the most part, but are not material or relevant to this action, for reasons explained in detail below at pp. 1105-1107.

[15]In 1974, the Southeast Freeway was constructed near the site of plaintiff's accident. It is uncontested that that construction placed a multi-lane highway with high walls between the site and the housing near the site, from which access to the site had formerly been direct. Access to the site across the Congressional cemetery has also been restricted by a fence since 1974. See Defendant's Reply (filed May 16, 1983) at 5. The record is uncontradicted that no catenary accident occurred at the site from 1974 until plaintiff's accident in 1979. In light of

the remoteness in time of the prior accidents, the changed circumstances since their occurrence, and the confusing and prejudicial effect that their introduction could have on a jury, evidence of these two accidents would be excluded at trial as a matter of law under Fed. R. Evid. 401 & 403. See infra at pp. 1105-1107.

[16]Plaintiff has alleged that the car on which Fearing was injured was "standing," Pretrial Brief at 4-5, but has provided no facts to support this assertion. Defendant has stated on two occations that Fearing "hopped a moving train," see Answers to Plaintiffs' Second Set of Interrogatories at 3, 9 (May 9, 1983); Defendant's Reply to Plaintiff's Opposition at 2, (e) (May 16, 1983) (Attachment: Memorandum of Admissibility). Plaintiffs' bare assertion need not be accepted under these circumstances. See F.R. Civ. P. 56(e) ("adverse party" to summary judgment motion "may not rest upon...mere allegation..., but his response...must set forth specific facts"). Nevertheless, the Court has considered the Fearing accident as a prior similar accident for purposes of this memorandum.

[17]Section 339 consists of five subsections setting forth necessary predicates for a finding of liability against a landowner for injuries suffered by a trespassing minor. It is set out in its entirety at pp. 1101-1102, infra.

[18]Plaintiffs' pleadings cite to Section 1234 of Title 7. In the 1981 codification of the D.C. Code, however, that section was renumbered as Section 1434, and the current D.C. Code contains no Section 1234.

[19]Congressman Byrns' complete statement was that the bill "involves simply the question of a permit to enable this railroad to proceed with

the work of electrifying its lines." 73 Cong. Rec. at 5426 (March 26, 1934). The House passed the bill almost immediately thereafter. In the Senate, the bill's sponsor Senator King had previously stated that "the bill is really to relieve one of the nuisances...namely, large quantities of smoke [from steam engines].... [T]his bill merely gives [the railroad] authority to put electric poles upon its own land within the District." 73 Cong. Rec. at 4888 (March 20, 1934). Nowhere in the brief debates of either house is there any reference to strict liability, or, for that matter, to the specific section of the bill that is now Section 1434.

[20]For example, strict liability usually requires the "escape" of some abnormal or non-natural dangerous force from the defendant's property. Prosser, supra, at 505, 508. The catenary system that has been in use on defendant's railroad for over 40 years might not be considered a "non-natural" use of defendant's land, id. at 506-07, and the high-voltage electricity did not "escape" from that land in any case. Moreover, in trespasser cases there generally can be no strict liability when the harm "is realized through unforseeable intervening causes," id. at 520, 21, and, as is demonstrated infra at pp. 1104-1109, it was not reasonably foreseeable that plaintiff would be injured by a wire suspended 18½ feet above railroad through tracks. Finally, when "sanction [is] given by statutory authority" to a dangerous activity, there can be no strict liability unless there is also a provision "expressly preserving the defendant's liability for any resulting damage," id. at 524, although a defendant may still be liable for negligence. D.C. Code Section 7-1430 expressly granted authority to District of Columbia railroads to install catenary systems but, as discussed in the text,

the language of Section 1434 by its terms merely continued the existing common-law negligence liability in operation of such systems.

[21]Plaintiffs also argue, in conclusory fashion, that Section 1434 sets a standard of conduct, violation of which creates "absolute" liability. Plaintiffs' Pretrial Brief at 164. Section 1434 contains no specific standards of conduct for the operation of catenary systems, however, and plaintiffs cite only cases and Restatement sections that concern violations of specific prohibitory or regulatory statutes, such as O'Donnell v. Elgin, Joliet & E.R. Co., 338 U.S. 384, 70 S.Ct. 200, 94 L.Ed 187 (1949). Plaintiffs have proffered no other evidence of any specific standards that defendant might have violated. Their argument on this point to the extent it is comprehensive, is frivolous.

[22]Accord Alston v. B&O R. Co., 433 F. Supp. 553, 568 (D.D.C. 1977) ("The absence of any one required element [of Section 339] renders irrelevant an assessment of the landowner's 'reasonableness' and signifies that he is not liable as a matter of law.")

[23]This conclusion rests on the specific undisputed facts of this case. There is no authoritative statement of law from the D.C. Court of Appeals in a catenary case that would justify an across-the-board conclusion that no minor plaintiff trespasser can ever revover under Section 339 for injuries received from suspended catenary wires. See Holland, supra, 431 A.2d at 605 (Ferren, A.J., dissenting) (advocating case-by-case decisionmaking under Section 339, while recognizing that summary judgment is an appropriate mode for such a decision).

[24]Comment (g) to Section 339 and the Reporter's Notes make it clear that "[t]he possessor is under no duty to make any investigation or inquiry as to whether children are trespassing, or are likely to trespass, until he is notified, or otherwise receives information, which would lead a reasonable man to that conclusion." Restatement, Ch. 13. at 201. Plaintiffs' allegation that Conrail "should have known" of child trespassers in the area, Pretrial Brief at 191, employs the exact phraseology that was rejected by the Restatement (Second) authors in favor of the "has reason to know" language. See Restatement (Second) of Torts Section 339, Appendix at 130 (Reporter's Notes, #3). Nevertheless, if a jury were to hear the undisputed evidence and draw favorable inferences for the plaintiff, the "has reason to know" standard could arguably be met here, despite plaintiff's failure to appreciate its meaning.

[25]Defendant, of course, disputes this conclusion and proffers evidence to the contrary, See Defendant's 9(h) Statement at 4, 10; note 10, supra. On summary judgment, however, this evidence must be disregarded: the dispute would be for the jury.

Defendant also cites a recent statement made by the D.C. Court of Appeals regarding the general area at issue here. The court stated that the area in question is not one

> "on which the railroad could not have operated to find human activity.... [I]t was not...near...[an] area where children ...were known to play or otherwise frequent."

Copeland v. B&O Railroad Co., 416 A.2d 1, 4 (D.C. App. 1980). Given that description, the court affirmed a grant of summary judgment against an adult trespasser injured by a train as he lay unconscious on the tracks. Because plaintiff here has adduced more evidence of human activity

in the area than was evidently before the court in Copeland, however, that court's description cannot be taken as a dispositive finding in this case.

[26]Defendant suggests that under Section 339(a), "it is not necessary that the minor plaintiff realize the precise injury or harm that occurs." Defendant's Memorandum at 26. Defendant contends that, although plaintiff may not have realized the dangers inherent in the catenary wires, he certainly realized and must be charged with appreciation of the dangers involved in climbing to the top of a 14-feet-tall railroad car. Id. at 25-27. This view of Section 339(c) is too broad in the context here. Although a plaintiff need not foresee "the exact accident" or "particular method" by which a danger will result in harm, see Alston, supra note 22, 433 F. Supp. at 569-70 n. 102, the plaintiff still must perceive the specific danger for Section 339(c) to be unfulfilled. Plaintiff was injured by the high-voltage electricity in the wires, and not by falling from the top of the car, and it is the danger of the wires, and not of falling, that is at issue here.

[27]Plaintiffs characterize the train upon which plaintiff was injured as a "parked" train, again without citing any factual support. Pretrial Brief at 194-95. This is simply contrary to the undisputed material facts that the train was en route and only stopped for twenty minutes for a signal at the Virginia Avenue tunnel. Accidents involving trains that had been parked or stored for long periods of time are inapposite to plaintiffs' case. See infra pp. 1106-1107.

[28]McCormick suggests that evidence of "other similar accidents" may generally be probative on four points: to show (1) that a particular

condition exists; (2) that a particular condition caused a plaintiff's injury; (3) that a particular condition is dangerous; or (4) to show a defendant's knowledge of the danger. McCormick's Handbook of the Law of Evidence Section 200 (E. Cleary ed. 1972); see also 22 Wright & Graham, Federal Practice and Procedure Section 5170 (1978). In this case, defendant concedes that the high-voltage catenary wires exist and that they caused plaintiff's injury. What is contested is whether they had reason to know that wires suspended at 18½ feet above through tracks would pose an unreasonable risk to children; this issue turns on the last two points suggested by McCormick.

[29]The burden to prove substantially similar circumstances for the purpose of admitting prior accidents is on the party seeking admission. Once again plaintiffs have failed to provide any but the most cursory factual accounts of these prior incidents. Defendant has also provided accounts of the prior incidents which are not incompatible with plaintiffs' facts, but which provide more detail. See Defendant's Reply (Attachment: Memorandum on Admissibility at 2-3); Defendant's Answers to Plaintiffs' Second Set of Interrogatories, 1-12. Independent evidence confirms some of defendant's accounts, see, e.g., Throop deposition; Windom deposition, and plaintiffs have not contested defendant's more detailed proffers. Because the decision regarding admissibility is for the Court in any case, defendant's uncontested details as well as plaintiffs' accounts have been relied upon in the text that follows.

[30]The possibility that plaintiffs would seek to introduce such evidence of prior accidents at trial by live or videotaped testimony by the surviving victims, a tragic and compelling, but irrelevant sight, simply compounds the

inadmissibility of such evidence.

[31]It must not be forgotten that even in the Windom case, judgment was granted for the defendant railroad as a matter of law. See supra p. 1097.

[32]The Court's extensive search has uncovered only one reported decision involving somewhat similar facts in which the issue of liability was held to be for the jury. In Scurti v. City of New York, 40 N.Y.2d 433, 387 N.Y. S.2d 55, 354 N.E.2d 794 (N.Y. App. 1976), a 14-year-old boy was electrocuted when he climbed on top of a freight car and touched catenary wires suspended overhead. The freight car was in a railroad yard and not briefly stopped on through tracks, thereby distinguishing Scurti's facts from plaintiffs. In addition, there had been four similar accidents at that particular yard in the four years prior to plaintiff's accident, unlike the six-year accident-free period here. In Scurti, New York's highest court decided to abandon the attractive nuisance doctrine of Section 339, thereby overruling a number of prior cases, and adopt the very same "reasonable care under the circumstances" standard that was considered and rejected by the D.C. Court of Appeals in Holland, supra. Applying this more flexible standard which has been authoritatively rejected in the District of Columbia, the Scurti Court ruled that "in this particular case the question of the reasonableness of the parties' conduct cannot be resolved as a matter of law." 387 N.Y. S.2d at 438, 354 N.E.2d at 799. The Scurti court also noted, however, that even under the less stringent reasonable care standard, not every case "raises a factual question for the jury's consideration." id. 387 N.Y. S.2d at 437, 354 N.E.2d at 798, thereby recognizing the propriety of summary judgment under less favorable facts.

[33]On March 28, 1983, the defendant deposed K.R. Shah, a doctor of electrical engineering, who evidently was identified as one of plaintiffs' expert witnesses. Plaintiffs, however, have not cited to any of Dr. Shah's deposition testimony nor have they even mentioned him in support of their opposition to defendant's motion for summary judgment. Therefore the Court may disregard his deposition testimony. In any case, his testimony is much too vague and speculative to provide any support for plaintiffs' case under Section 339. First, Dr. Shah stated in deposition that he could design a catenary system in which a person contacting it "would not be electrocuted" and "may not be receiving as much electric shock." Shah Deposition at 86. Thus his testimony did not relate to "elimination" of the danger posed by catenary wires, as required under Section 339(d). Second, Dr. Shah repeatedly stated that he did not have sufficient information to make a cost estimate, even a general one, regarding such a system. Id. at 25, 29, 58, 62 & 75. He noted that "many" relevant pieces of information were "missing" from his analysis at that time. Id. at 32. Thus his testimony could not support a cost-benefit analysis under Section 339(d). Third, his testimony appears to have been related to the design of such a system, and not the cost or logistic burdens involved in installing or maintaining the system. For these reasons, Dr. Shah's deposition testimony is largely irrelevant to the inquiry under Section 339(d), and in no way does it create a genuine issue of material fact as to the cost of a "safe" catenary system.

[34]Subsection (d) of Section 339 does not mandate that if injury is certain when the wires are touched then the risk must be calculated as great, as plaintiffs appear to suggest in their pretrial brief at 195. This argument omits from the equation the factor of the possibility and

likelihood of access to the wires. The question is not whether the harm itself is great, but whether the risk of that harm actually occurring is great. Although the harm to plaintiff in this case was undeniably great, one catenary accident in six years (1973-79) indicates that the risk of that harm occurring to children is slight.

[35]No evidence at all on this issue is cited in plaintiffs' opposition to summary judgment; their only statement is that "[p]laintiffs... contend that the burden...as compared to the danger to children is slight," with reference to "plaintiffs' engineer, sign company representative, fencing company representative, and others." Id at 5. These persons are not identified by name in any of plaintiffs' pleadings, and no depositions of such persons have been brought to the Court's attention. Plaintiffs' pretrial brief is not much better: it alleges that defendant's decisions as to fencing and other protective devices were based on erroneous "economic assumptions," without sypplying any supporting evidence or counter-arguments, and specific figures are provided only with regard to putting up signs warning of the danger. Pretrial Brief at 195. This "evidence" amounts to all of one page in the 225-page brief. As discussed in the text, it simply does not create a material issue of fact capable of justifying a jury trial.

[36]Plaintiffs argue here that defendant should have posted signs that warn specifically against the danger of the high-voltage catenary wires. But as defendant points out, there are many dangers associated with railroad tracks, and catenary accidents are not the most common. Rather than put up a specific sign warning against each particular danger at a site, defendant posts "No Trespassing" warnings which, if obeyed, protect against all the myriad dangers. Plaintiffs

suggested signs would be no more effective than defendant's, and perhaps less so, if children chose to ignore them.

[37] In Dugan, the plaintiff was an eleven and one-half year-old boy who was seriously injured when he climbed onto a railroad car "temporarily stopped at a signal on [a] main line track[]" and waved his hand close to the catenary wire suspended above the car, receiving a great electric shock. 127 A.2d 344-45. The railroad car was located less than 100 feet from a school's property, and children were well known to play near the railroad tracks, and even to climb "over the top of boxcars." Id. Thus the facts of Dugan were even more favorable to the plaintiffs than are the facts in the instant case. Yet the Pennsylvania Supreme Court held that the plaintiff could not recover under Section 339 as a matter of law.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 83-1849 September Term, 1983

Eldee Edwards, Jr.,
et al.

Appellants

v.

Consolidated Rail Corporation

Appeal from the United States District Court for the District of Columbia.

Before: WILKEY and WALD, Circuit Judges, and RICHEY, *United States District Judge for the District of Columbia

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 31(c).

*Sitting by designation pursuant to 28 U.S.C. Section 292(a).

On consideration of the foregoing, It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed on the basis of District Judge Oberdorfer's opinion.

It is ORDERED, sua sponte, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
For the Court

George A. Fisher
Clerk

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 83-1849 September Term, 1983

Eldee Edwards, Jr., et al. Civil Action No. 82-01874

Appellants

v.

Consolidated Rail Corporation

BEFORE: Tamm and Wilkey, Circuit Judges, and Richey*, District Judge, United States District Court for the District of Columbia

ORDER

On consideration of the Petition for Rehearing of Appellants, filed April 2, 1984, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam
For the Court:

GEORGE A. FISHER,
Clerk

BY:
Robert A. Bonner
Chief Deputy Clerk

*Sitting by designation pursuant to Title 28 U.S.C. Section 292(a).

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 83-1849 September Term, 1983

Eldee Edwards, Jr., et al. Civil Action No. 82-01874

Appellants

v.

Consolidated Rail Corporation

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges, and Richey*, District Judge, United States District Court for the District of Columbia

ORDER

The Suggestion for Rehearing en banc of Appellants, filed April 2, 1984, has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court en banc that the aforesaid Suggestion is denied.

Per Curiam
For the Court:
GEORGE A. FISHER, Clerk
BY:
Robert A. Bonner
Chief Deputy Clerk

*Sitting by designation pursuant to Title 28 U.S.C. Section 292(a).

D.C. Code Section 7-1430

Steam-railroad companies now operating within the District of Columbia are hereby authorized, after approval of their detailed plans and issuance of a permit by the Commissioner of the District of Columbia, to electrify their lines within the District of Columbia and across the Anacostia and Potomac Rivers with an alternating current overhead catenary or other type of electrification system, with all necessary transmission, signal, and communication conductors and equipment, poles, conduits, underground and overhead construction, substations, and any other structures necessary in such electrification, the provisions of any law or laws to the contrary notwithstanding.

D.C. Code Section 7-1434

Liability of Railroads for Injuries

The said railroad companies shall be liable for any accident to, or injuries sustained by, any person by reason of any act or omission of the

railroad companies or by their agents or servants during the construction, installation, maintenance, or operation of the electrical equipment and apparatus of the railroad trains.

Restatement 2d, Torts, Section 285

How Standard of Conduct is Determined

The standard of conduct of a reasonable man may be

(a) established by legislative enactment or administrative regulation which so provides, or

(b) adopted by the court from a legislative enactment or administrative regulation which does not so provide, or

(c) established by judicial decision, or

(d) applied to the facts of the case by the trial judge or the jury, if there is no such enactment, regulation, or decision.

Restatement 2d, Torts, Section 286

When Standard of Conduct Defined by Legislation or Regulation Will be Adopted

The court may adopt as the standard of conduct

of reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part

(a) to protect a class of persons which includes the one whose interest is invaded, and

(b) to protect the particular interest which is invaded, and

(c) to protect that interest against the kind of harm which has resulted, and

(d) to protect that interest against the particular hazard from which the harm results.

Restatement 2d, Torts, Section 339

Artificial Conditions Highly Dangerous To Trespassing Children

A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if

(a) the place where the condition exists is one upon which the possessor knows or has

reason to know that children are likely to trespass, and

(b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and

(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and

(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and

(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

RULE 56

SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall

be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy,

including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits, Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading,

but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable

expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.